Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DEAN M. CRIST,

Petitioner,

v.

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, MICHAEL ALLEN, WA-SWA-GON TREATY ASSOCIATION, THOMAS MAULSON, ROBERT MARTIN, NICK HOCKINGS, and GILBERT CHAPMAN,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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110 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is the Chippewas' theory of usufructuary fishing rights in lands ceded to the United States government consistent with their receipt of compensation from the Indian Claims Commission for loss of those rights?

2. Can the district court constitutionally base a finding of unlawful racial animus under 42 U.S.C. §1982 on political speech directed against the Chippewa by petitioner?

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PREVIOUS OPINIONS

There have been two reported district court opinions and two reported Court of Appeals opinions in this case. The full text of each is set forth in the Appendix. All may be cited as *Lac Du Flambeau, et al. v. Stop Treaty Abuse - Wisconsin, et al.* The citations are as follows:

1. 781 F.Supp. 355 (W. D. Wis. 1992);
2. 991 F.2d 1249 (7th Cir. 1993);
3. 843 F.Supp. 1284 (W. D. Wis. 1994);
4. 41 F.3d 1190 (7th Cir. 1994).

STATEMENT OF JURISDICTION

The Court of Appeals filed its decision in this case on December 10, 1994. No petition for rehearing was filed.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

25 U.S.C. § 70(a) (Repealed);

42 U.S.C. § 1982; 42 U.S.C. § 1988

(statutory texts are reprinted in full in the Appendix)

STATEMENT OF THE CASE

Course of Proceedings

The respondents-plaintiffs, Lac Du Flambeau Band of Lake Superior Chippewa Indians, Michael Allen, Wa-Swa-Gon Treaty Association, Thomas Maulson, Robert Martin, Nick Hockings, and Gilbert Chapman (collectively "plaintiffs" or "the Chippewa") filed a complaint against defen-

dant Stop Treaty Abuse-Wisconsin and defendant-petitioner Dean Crist ("defendants") in the United States District Court for the Western District of Wisconsin. Plaintiffs sought injunctive relief against the defendant organization and its spokesman, Crist, to prevent them from interfering with their off-reservation spearfishing and gillnetting activities. They based their claims upon 42 U.S.C. §§1982; 1983, 1985(3) and 1986.

After plaintiffs were granted a preliminary injunction, the district court entered summary judgment, finding that defendants' interference with plaintiffs' "rights" was based upon racial animus against Native Americans. The Seventh Circuit Court of Appeals reversed and remanded, holding that defendants' motivation was a question of fact.

Following a bench trial, the district court once again ruled for the plaintiffs, and entered a permanent injunction against defendants. The Seventh Circuit affirmed this decision.

The Chippewa Treaties with the United States

Most of the historical facts set forth below are derived from the discussion in *Lac Courtes Oreilles etc. v. Voigt*, 700 F.2d 341 (7th Cir. 1983).

The plaintiffs are one of the bands of Chippewa Indians in the Upper Midwest/Western Great Lakes region. In 1837 and 1842, the Chippewa entered into several treaties with the United States government. These treaties ceded large amounts of tribal land to the government in exchange for substantial compensation. The Chippewa spokesmen advised the government's negotiator that the band wished to continue to fish and hunt on the ceded lands.

Pursuant to this request, Article V of the Treaty of 1837 between the Chippewa and the government provides:

> The privilege of hunting and fishing . . . upon the [ceded lands] is guarantied [sic] to the Indians during the pleasure of the President of the United States.

A similar treaty was entered in 1842 with the Chippewa of Lake Superior and the Mississippi.

In 1850, the President issued an Executive Order rescinding the privileges of hunting, fishing and gathering granted by the 1837 and 1842 treaties.

The Indian Claims Commission

By legislation passed in 1946, Congress created the Indian Claims Commission to hear the claims of any tribe, band or group of American Indians against the federal government. Congress intended to provide final and complete settlement of all claims. Congress delegated its previous responsibility in this area to the Commission. *United States v. Dann*, 470 U.S. 39, 45-48 (1985).

The Lake Superior Chippewa brought several claims of "unconscionable consideration" pursuant to the 19th Century treaties. The decision of the Indian Claims Commission included as one of the items for which compensation was sought the "natural resources" on the ceded land. Included among the natural resources were "its climate, vegetation, including timber, *game and wildlife*, mineral resources . . ." (Doc. No. 310; Aff. of R. Sommer).

In a claim under the Treaty of 1842, the value of fish in the lakes and streams of the ceded land is explicitly recognized (Docket No. 18-S). The United States included among its proposed findings of fact recognition of the fishery present in the area. In its findings of fact with respect to the area ceded in 1842, the Claims Commission allotted a value to the waters of the area, which of necessity includes the fish present in the water, for which the Chippewa were awarded additional compensation. (*Id.*; Exhs. to Aff.)

Lac Courtes Oreilles v. Voigt

In the late 1970s, the Lac Courtes Oreilles band of Chippewa filed a declaratory judgment action to establish that the Lake Superior Chippewa retained treaty-based rights to fish, hunt and gather in their traditional manner, which in some respects violated Wisconsin state regulations. The district court granted summary judgment for the defendants (basically, the State of Wisconsin), based upon an 1854 treaty establishing Chippewa reservations. However, the Seventh Circuit Court of Appeals reversed (*Lac Courtes Oreilles v. Voigt*, 700 F.2d 341 (7th Cir. 1983)), holding that neither the Executive Order of 1850 nor the Treaty of 1854 extinguished the Chippewa's usufructuary rights on the ceded land.

Following remand, the ultimate decision of the district court with respect to usufructuary rights was that the Lac Courtes Oreilles had the right to hunt and fish on the ceded land with any techniques they desired, but could not hunt or fish on privately-owned ceded land. *Lac Courtes Oreilles v. Voigt*, 653 F.Supp. 1420, 1435 (W.D. Wis. 1987).

The Instant Litigation

Shortly after the *Lac Courtes Oreilles* decision authorized the use of *any* methods for exercise of the Chippewa's usufructuary fishing "rights", defendants and other groups began gathering at lakes in northern Wisconsin to protest spearfishing and gillnetting of walleyed pike and muskellunge, two of the more popular sport fish for rod and reel fishermen in northern Wisconsin. Defendants objected to the Chippewa's supposed right to avoid Wisconsin Department of Natural Resources' limitations on methods and quantities of fishing.

Rather than burdening this court with the voluminous trial record regarding the protests at the lakes and land-

ings, petitioner simply commends this court to the district court and the Seventh Circuit opinions, all of which are reproduced in the Appendix to this petition.

Plaintiffs filed this action to enjoin the interference with their fishing rights (Doc. No. 2). The district court granted a preliminary injunction (Doc. No. 88).

Prior to a hearing on the plaintiffs' motion for summary judgment and a permanent injunction, defendants sought leave to file affirmative defenses challenging plaintiffs' claim that they had any rights to protect under 42 U.S.C. §1982 (Docs. Nos. 248; 329). This argument was based upon the resolution of the Chippewa's claims before the Indian Claims Commission. Plaintiffs moved to strike the affirmative defense based upon untimeliness with the district court's pretrial scheduling order and because of the supposed *res judicata* effect of *Lac Courtes Oreilles v. Voigt.*

The district court granted summary judgment to the plaintiffs. *Lac Du Flambeau v. Stop Treaty Abuse - Wisconsin*, 781 F.Supp. 1385 (W. D. Wis. 1992). The court agreed that the Indian Claims Commission defense was barred by *res judicata. Id.* at 1388. The court found no issues of fact with respect to defendants' racial motivation for interfering with the plaintiffs' rights and entered a permanent injunction. The Seventh Circuit reversed, holding that defendants' racial animus was a question of fact to be tried to the court, and remanded. *Lac Du Flambeau v. Stop Treaty Abuse - Wisconsin*, 991 F.2d 1249 (7th Cir. 1993). As to defendants' affirmative defenses, the Seventh Circuit held that the district court had discretion to deny leave to amend the pleadings as untimely, even though the district court did not explicitly rely on untimeliness. At the same time, the court, *in dictum*, stated that the Indian Claims Commission's argument was an improper collateral attack on the *Voigt* case. *Id. at* 1256-57.

Following a bench trial, the district court again held for plaintiffs, and permanently enjoined defendants from:

A. Assaulting or battering any member of the Lac Du Flambeau band or any member of the family of a Lac Du Flambeau band member at any landing or on any lake within the ceded territory;

B. Intentionally creating wakes on any waterway to interfere with any spearer;

C. Planting decoys in any waterways;

D. Intentionally blocking spearing boats from moving from the boat landings out to the spawning beds;

E. Shining lights into the eyes of any spearer or spearing boat operator while on the water;

F. Playing "leap frog" with any spearing boat, or otherwise impeding the progress of any spearing boat; and

G. Taking any other action that is intended to or may reasonably be expected to interfere with plaintiffs' exercise of their spearing rights, including blowing whistles at spearers or any members of their families. *Lac Du Flambeau v. Stop Treaty Abuse - Wisconsin*, 843 F.Supp. 1284, 1295 (W.D. Wis. 1993).

The district court also entered judgment for plaintiffs against defendants for attorneys fees under 42 U.S.C. §1988, in the amount of $82,647, which supplemented the award of $159,194.50 for previous work.

The Seventh Circuit affirmed the decision of the district court. The court found that that district court's decision regarding defendants' racial motivation was not clearly erroneous. It also affirmed the attorney fee award. *Lac Du Flambeau v. Stop Treaty Abuse - Wisconsin*, 41 F.3d 1190 (7th Cir. 1994).

ARGUMENT

I.

THE JUDGMENT OF THE DISTRICT COURT IN THIS CASE IS TAINTED BY ITS REFUSAL TO CONSIDER THE LEGAL EFFECT OF THE CHIPPEWA'S RECEIPT OF COMPENSATION FROM THE INDIAN CLAIMS COMMISSION.

Political correctness is an insufficient reason for ignoring the truth.

In 1983, the State of Wisconsin appealed the decision of the Western District of Wisconsin which allowed the Lac Courtes Oreilles band of Chippewa to spearfish and gillnet on the lands ceded by the tribe to the United States. The State *never argued* in either the district court of the court of appeals that the Lac Courtes Oreilles had no treaty-based right to spearfish or gillnet on lands other than their reservations because of a prior judgment of the Indian Claims Commission, in which the Chippewa claimed, and were awarded, compensation for the loss of the fishery and waters on the ceded lands.

In this case, before the summary judgment which was the subject of the first appeal, the defendants sought leave to file affirmative defenses and other pleadings asserting that no claim could be brought for interference with property rights under 42 U.S.C. §1982, because no such rights existed, the Chippewa having recognized the prior transfer of those rights by submitting claims to the Indian Claims Commission for inadequate compensation.

The district court refused to even consider the issue.[1]

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[1] The Seventh Circuit disingenuously stated that the district court properly exercised its discretion in refusing to allow a late pleading. The district court exercised no such discretion; its discussion in the order granting summary judgment relates only

(continued...)

Crist's plea to this court is simple: this issue is too important, both in its specific application to the natural resources of northern Wisconsin, and its general application to the finality and preclusive effect of special, congressionally-mandated proceedings, to eliminate based upon an and awkward and unjust extension of the doctrine of *res judicata*.

The district court, in its order denying leave to file pleadings relating to the Indian Claims Commission, did not bother to analyze the implications of its decision. It simply held that the matter was concluded by the 1983 *Voigt* litigation.

A. *Res Judicata* Should Not Have Applied to the Proposed Affirmative Defenses.

What the district court conveniently overlooked is that the plaintiffs, although similarly-situated, are not the same in the two litigations; the defendants are different (Crist and Stop Treaty Abuse-Wisconsin, as opposed to the State of Wisconsin). Moreover, there is not a pure identity of issues between the two cases. In the first case, the issue was whether the 19th Century treaties and executive orders extinguished *all* Chippewa fishing rights in the ceded lands. The issue defendants sought to raise in the instant litigation is whether the Chippewa could continue to assert treaty rights after receiving an award of additional compensation from the Indian Claims Commission.

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[1] (...continued)
to the plaintiffs' claim that the *Voigt* decision precludes litigation of this issue. *Compare*, 781 F.Supp. at 1388 and 991 F.2d at 1256-57. The procedural burying of this issue by the court of appeals allowed it to conveniently overlook the merits in the first appeal, and effectively precluded review in the second appeal, which related only to the issue of racial animus.

Additionally, there is a significant question of adequate representation of the defendants in the instant case by the State of Wisconsin in the *Voigt* case. As representatives of the State of Wisconsin seeking to protect important natural resources, it was incumbent upon the Attorney General to become acquainted with all aspects of case. Somehow, the Attorney General failed to recognize that the subject of Chippewa rights with respect to fishing in the ceded lands had been the subject of litigation and compensation before a government body with the power to enter a preclusive judgment. *Havasupai Tribe v. United States*, 752 F.Supp. 1471 (D. Ariz. 1990); *White Mountain Apache Tribe v. Clark*, 604 F.Supp. 185, 187-89, *aff'd* 784 F.2d 921 (9th Cir. 1986); *cert. den.*, 479 U.S. 1006 (recognizing broad preclusive effect of matters which were or could have been raised before the Indian Claims Commission).

Finally, other element of *res judicata* are not present. For example, there is no identity of issues in this case. The *Voigt* case resolved whether the Chippewa had lost the right to fish in their traditional manner by virtue of the presidential order revoking their rights and the treaty moving them on to reservations. The instant case, assuming all affirmative defenses are in place, uses *Voigt* as a factual predicate, but concerns the effect of the Indian Claims Commission award upon the Chippewa's right to fish and hunt in the traditional manner on the ceded lands.

In fact, this raises one of the bitter ironies in this case. The Chippewa received compensation premised upon the idea that they had been unfairly compensated for what they gave up from the ceded lands. The Chippewa should have been *judicially* estopped in the *Voigt* case from arguing that they retained treaty-based fishing rights in the ceded lands, when they had received compensation for having lost those rights. *Chaveriat v. Williams Pipe Line Co.*, 3 F.3d 1420

(7th Cir. 1993) (party may not repudiate a position in second litigation upon which it prevailed in prior litigation). The irony is that the Chippewa raised one form of preclusion (*res judicata*) to defeat a clear defense based upon another type of preclusion (judicial estoppel).

If anything, the unfairness of the Chippewa taking inconsistent positions calls for the "interest of justice" exception to *res judicata*. See Wright, Miller and Cooper, *Federal Practice and Procedure*, Jurisdiction §4426 (1981). Even if this Court believes the Chippewa rights are established because of the *Voigt* decision, the unfairness of allowing them to profit from one position in litigation, and then repudiate that position in subsequent litigation, should be not attenuated if one litigant (the State of Wisconsin) fails to call this unfairness to one court's attention.

B. The Chippewa's Position in the Indian Claims Commission Is Clearly Inconsistent with Their Position in *Voigt* and the Instant Case.

The nature of the Chippewa claims before the Indian Claims Commission, and the compensation which they received, are clearly inconsistent with their claim of continuing treaty rights.

Claims by the Lake Superior Chippewa were brought before the Commission in Docket Nos. 18-C, 18-S and 18-U in which the Chippewa contended that the Treaties of 1837, 1842 and 1854 provided "unconscionable consideration" for the loss of the ceded land. The Commissioner found for the Chippewa and awarded them additional compensation in the total amount of over $20 million. *See, generally, Minnesota Chippewa Tribe, et al. v. U.S.*, 32 Ind. Cl. Comm. 142 (1973); 41 Ind. Cl. Comm. 102 (1977); 41 Ind. Cl. Comm. 249 (1978).

The treaties of 1837 and 1842 ceded lands in which the Lake Superior Chippewa retained the right to hunt, fish and gather wild foods at the pleasure of the president of the United States. By treaty of 1854, the Chippewa were moved onto reservations.

After the establishment of the Indian Claims Commission, which had the power to fully and finally resolve all Indian claims against the government (*United States v. Dann*, 470 U.S.39 (1985)), the Chippewa sought compensation for inadequate consideration for the loss of certain rights on the ceded lands. The record of the Commission decision shows that one of the elements of value on which the Commission relied in reaching its conclusion was the "natural resources" on the land. Included within that general category are "its climate, vegetation, including timber, game and wildlife, mineral resources. . ." Thus, by compensating the Chippewa for the loss of fish and game within the ceded territory, the Chippewa recognized that they had given up treaty-based rights in those resources.

Perhaps even more explicit is the record of the Commission in Docket No. 18-S, relating to lands ceded by the Treaty of 1842. In that docket, the value of fish in the lakes and streams of the ceded land is explicitly recognized in the records. The defendant United States included among its proposed findings of fact recognition of the "fishery" present in the area. In its findings of fact with respect to the area ceded in 1842, the Commission allotted a value to the waters of the area, which necessarily included the fish present and for which the Chippewa were awarded additional compensation.

It is not Crist's intention at this point in the proceedings to secure a determination that the Chippewa have *no* right to fish or hunt in the ceded land. That is not the issue in this case. The issue is whether the "right" to fish and hunt

in the traditional Chippewa manner, recognized in the *Voigt* case, is consistent with a claim that the Chippewa lost such rights, necessitating compensation, by virtue of the cessation of the lands through the 1837, 1842 and 1854 treaties.

In summary, there is little doubt from the records of the Indian Claims Commission that the Chippewa were compensated for loss of fishing resources in the ceded lands. Because the judgment of the Indian Claims Commission had the force of a judgment of the United States Court of Claims, it fully and finally disposed of all claims under the 19th-Century treaties. This point was not precluded by means of *res judicata*; the parties are different, the issues are different, and the defendants' interests were inadequately represented by the State of Wisconsin in the *Voigt* case.

Both the Chippewa and non-Chippewa community in Northern Wisconsin have been embroiled in disputes for over a decade because of a rogue decision (*Voigt*) which creates dangerous inequalities among citizens and threatens a vital resource. This court should grant *certiorari* to resolve this critical issue.

II.

THE DISTRICT COURT'S FINDING OF RACIAL ANIMUS BASED UPON PURELY POLITICAL SPEECH WILL HAVE A SEVERELY CHILLING EFFECT ON ALL FUTURE POLITICAL PROTEST.

A cursory reading of the district court's findings of fact with respect to petitioner Crist demonstrates that Crist is a political adversary of the Chippewa. His views are clear: he believes that between the incorrectness of *Voigt* and the effect of the Indian Claims Commission proceedings, the Chippewa had no right to spearfish or gillnet in the ceded

lands and has devoted a substantial amount of his adult life to promoting that viewpoint. People may disagree as to whether Crist's advocacy represents a deep and abiding concerning for the natural resources of northern Wisconsin or anti-Chippewa animus. The answer to that question, however, is not the point of Crist's First Amendment argument.

The First Amendment becomes a factor in this case because the plaintiffs have taken Crist's advocacy of limited Chippewa fishing rights, squeezed their grievance into the amorphous confines of a civil rights claim and, combined with attorney fee liability under 42 U.S.C. §1988, driven him towards financial ruin. This has all taken place without a shred of evidence of anti-Chippewa animus except for Crist's taking a leading role in the protests. Such a result places an undue burden on plainly political speech.

Crist is not attacking 42 U.S.C. §1988 or 42 U.S.C. §1982 as unconstitutional on their faces. Rather, it is the specter of enormous financial liability under these statutes for strenuously advocating a political position which implicates the First Amendment because of the chilling effect on speech.

Crist recognizes that spurious First Amendment claims have been rejected when raised by defendants accused of racially or sexually harassing speech. *See, e.g., Jenson v. Eveleth Taconite Co.*, 824 F.Supp. 847 (D. Minn. 1993) (n. 89). The key difference between the situations is *context*. The sexual harasser who claims that the First Amendment protects him from liability for making crude and offensive statements to women is not engaged in political activity. If anything, sexual or racially harassing expression may more properly be classified as unprotected utterances, such as obscenity or fighting words. Such words have no political,

educational, literary or informative content. Or, as in *Jenson*, the expression may be considered as part of the unlawful conduct.

But the record unmistakably demonstrates that any "racially" derogatory expressions by Crist (and there was no real evidence of such remarks) were all in the context of a political controversy pitting Crist and his followers against adversaries who, by definition, were all part of a group arguably protected by the civil rights statutes.[2]

The chilling effect of attorney fee liability for political protest under the civil rights statutes is onerous and portentous for others. Every organizer of protests against rights supposedly held by groups protected by the civil rights statutes will be stifled by the threat of an attorney fee judgment. For example, if a white contractor leads a protest against minority set-asides, and that protest interferes with a minority contractor's work, the contractor could theoretically sue the organizer under 42 U.S.C. §1982, take the case to trial and, through an attorney fee judgment, bankrupt the contractor.

The point of this example is that the civil rights statutes, passed in the 19th Century and long before 42 U.S.C. §1988 came into play, were not meant to stifle political protests. But an extreme definition of property under 42 U.S.C. §1982 and the threat of liability for attorney fees under 42 U.S.C. §1988 will impermissibly choke political expression so long as the object of the political protest is a protected minority. The marketplace of ideas becomes one-sided; only

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[2] Under *Morton v. Mancari*, 417 U.S. 535 (1974), it is doubtful whether a federally recognized Indian tribe, which is a political organization, constitutes a "race" or "national origin." *Id.* at 553-54, n.24.

the politically correct may speak out without fear of governmental consequences.

This Court has long expressed solicitude for free and open political debate, even in the cauldron of public disorder. *Hess v. Indiana*, 414 U.S. 105 (1973); *Cohen v. California*, 403 U.S. 15 (1971); *Texas v. Johnson*, 491 U.S. 397 (1989). The difference between these cases (criminal sanctions versus civil liability) is insignificant. Crist engaged in adversarial political protest. Because the subjects of his protest belonged to a supposedly-protected minority group, he stares down the barrel of personal bankruptcy. Any individual who opposes abortion on demand, minority preferences or any other "right" held by a so-called preferred group, will think twice before speaking out in public. Such a result makes a travesty of the First Amendment.

CONCLUSION

For these reasons, the petitioner, Dean M. Crist, respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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March 8, 1995

App. 1

[Dated January 6, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

No. 91-C-117-C

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, MICHAEL ALLEN, WA-SWA-GON TREATY ASSOCIATION, THOMAS MAULSON, ROBERT MARTIN, NICK HOCKINGS, GILBERT CHAPMAN,

Plaintiffs,

v.

STOP TREATY ABUSE-WISCONSIN, INC., DEAN CRIST, TOMMY HANDRICK, Unknown John Does and Jane Roes,

Defendants.

OPINION and ORDER

This is a civil case for injunctive relief in which plaintiffs seek a permanent injunction preventing the named defendants from interfering intentionally with the exercise of treaty-recognized hunting, fishing and gathering rights by any member of the plaintiff band. A preliminary injunction to this effect has been in place since March 15, 1991. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty-Abuse, Wisconsin, Inc.*, 759 F. Supp. 1339 (W.D. Wis. 1991).

The case is before the court at this time on plaintiffs' motion for summary judgment; on plaintiffs' motion to

strike the supplementary brief and affidavit in opposition to the motion for summary judgment filed by defendants Stop Treaty Abuse-Wisconsin, Inc. and Dean Crist; on the motion of defendants Stop Treaty Abuse and Dean Crist for leave to file a second amended answer to assert two additional affirmative defenses; and on plaintiffs' motion to strike the untimely motion for summary judgment filed by the same defendants. I turn first to the motion for leave to file a second amended answer.

At a hearing held on October 31, 1991, I denied a motion by these same defendants to file a first amended answer to add as an affirmative defense the claim that the individual plaintiffs lacked standing to pursue this suit because they are not full-blooded Chippewa. The motion was untimely, and in my view so lacking in merit as to make amendment futile. *See Verhein v. South Bend Lathe, Inc.*, 598 F.2d 1061, 1063 (7th Cir. 1979) ("court may deny leave to amend where the proposed amendment fails to allege facts which support a valid theory of liability . . . or where the party moving to amend has not shown that the proposed amendment has substantial merits").

In their new motion to amend, defendants Stop Treaty Abuse and Crist (hereafter, defendants) seek to assert the same claim in their proposed amended answer, as well as the claim that the plaintiffs are barred by the doctrine of res judicata from asserting retained rights to hunt, fish and gather in the ceded territories because the Indian Claims commission ruled definitively on those rights in 1973, 1977 and 1978.

Defendants have shown no reason to reverse the earlier holding that there is no merit to their claim that the individual plaintiffs lack standing to pursue this action because they may lack proof that they are full-blooded Chippewa. The Lac du Flambeau band has treaty-protected

usufructuary rights to hunt, fish and gather in the ceded territory. Those rights may be exercised by its members. Who those members are is to be determined by the band under the well-settled law that Indian tribes have the power to regulate their internal and social relations with respect to membership, inheritance and domestic relations, subject to the plenary authority of Congress. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978). Defendants have no standing to challenge the criteria by which the band determines its membership, and they are not contending that the Lac du Flambeau band does not consider the individual plaintiffs to be members of the band. Therefore, there is nothing to the affirmative defense defendants are seeking to assert.[1]

In their proposed amendment defendants contend that the Indian Claims Commission rulings bar the tribes from asserting their usufructuary rights. That claim is out of place in this law suit. The plaintiff tribe's right to hunt, fish

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[1] In their brief in opposition to plaintiffs' motion for summary judgment, defendants raise what appears to be a variation of the theme that plaintiffs have no standing to bring this suit. Defendants argue that plaintiffs cannot assert any treaty rights because the Lac du Flambeau band has not maintained an organized tribal structure, that is, the band cannot show that some defining characteristic of the original tribe persists in an evolving tribal community, *Native Village of Venetie I.R.A. Council v. Alaska*, 918 F.2d 797 (9th Cir. 1990), *amended, op. withdrawn, superseding op.*, 944 F.2d 548 (9th Cir. 1991), and therefore, it is not entitled to claim the benefits of the treaties between the federal government and the tribe from which the Lac du Flambeau claims descent. This issue cannot be raised in this action. The Lac du Flambeau band's entitlement to the benefits of the treaties has been resolved definitively in litigation between it and the State of Wisconsin. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin (Final Judgment)*, 775 F. Supp. 321 (W.D. Wis. 1991). The principles of res judicata bar relitigation of the issue.

and gather in the ceded territory of Wisconsin has been determined in other litigation to which all of the citizens of the State of Wisconsin were party, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin (Final Judgment)*, 775 F. Supp. 321 (W.D. Wis. 1991). That holding may not be reexamined in this suit. The res judicata effect of the Indian claims Commission proceedings could have been raised in that suit (and was raised, in connection with the timber subphase of the case, *see Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin (Timber)*, 758 F. Supp. 1262 (W.D. Wis. 1991)). Therefore, the ordinary principles of res judicata preclude defendants from litigating in this suit the effect on the earlier suit of the Indian Claims Commission proceedings. *See generally* 18 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice & Procedure, §§4401-4478 (1981).

Because there is no merit to either of defendants' proposed affirmative defenses, it would be futile to grant them leave to serve and file their untimely proposed second amended answer. Their motion for such leave will be denied.

I turn next to plaintiffs' motion to strike defendants' supplemental brief and affidavit in opposition to plaintiffs' motion for summary judgment. Plaintiffs' opposition to this brief derives from the same basis as their opposition to defendants' motion to file and serve a second amended answer. In the supplemental brief, defendants argue that the Indian Claims Commission proceedings preclude the plaintiffs from asserting any usufructuary rights in the ceded territory. Because defendants have been denied leave to amend their answer to raise this claim, and because the issue cannot be litigated in this case, defendants' argument has no relevance to any issue in the case and need not be

considered. Plaintiffs' motion to strike the supplemental brief and affidavit will be granted.

For the same reasons, plaintiffs' motion to strike the defendants' motion for summary judgment will be granted. The motion is based on the same meritless claims defendants seek to add to their answer.

I turn finally to plaintiffs' motion for summary judgment. For the purpose only of deciding this motion, I find that there is no genuine issue with respect to any of the following material facts.

UNDISPUTED FACTS

The Lake Superior Chippewa are a tribe recognized by the United States. The Chippewa entered into treaties with the United States by which they ceded territory to the federal government, but reserved the right to hunt, fish and gather food.

Plaintiff Michael Allen is president of the Lac du Flambeau band of Lake Superior Chippewa Indians and is its highest elected official. Wa-Swa-Gon Treaty Association is an unincorporated association of members of the Lac du Flambeau band and others. It supports the tribels exercise of off-reservation treaty-recognized fishing rights. Plaintiffs Tom Maulson, Nick Hockings, Robert Martin and Gilbert Chapman are members of the Lac du Flambeau band who reside on the Lac du Flambeau reservation. As members of the band, they have the right to engage in off-reservation treaty protected fishing in the ceded territory.

Defendant Stop Treaty Abuse-Wisconsin, Inc. is a for-profit corporation organized under the laws of the State of Wisconsin, with its principal place of business at AV 2075 Witches Lake Road, Woodruff, Wisconsin. Defendant Dean Crist is a member and co-founder of Stop Treaty Abuse-

Wisconsin, Inc. and a spokesman for it. He resides in Minocqua, Wisconsin. Defendant Tommy Handrick is a resident of Minocqua and has been a member of Stop Treaty Abuse-Wisconsin, Inc. at all relevant times.

The significance of fishing for the Chippewa is religious and cultural as well as economic. Traditional religious rituals and festivals are an important part of Chippewa fishing activities.[2]

In order to spear walleye, Chippewa spearers wear helmets similar to a miner's, with a lantern attachment, and they carry a ten foot spear. Typically, the spearer will stand in the front of a boat, concentrating all of his attention on the water, which is lighted by his helmet lamp. High wakes interfere with a spearer's ability to spear, and create the danger of his falling into the near-freezing water.[3]

Stop Treaty Abuse-Wisconsin, Inc. was formed between the 1988 and 1989 walleye spearing seasons. After it became active, protests against Chippewa spearing escalated, crowds increased at the boat landings where spearing was taking place and the practice of creating wakes to

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[2] Defendants try to put this fact into dispute with the affidavits of persons present on the boat landings who say that they observed few instances of religious ceremonies occurring on the landings in connection with spearing. Whether these persons observed ceremonies in a particular place at a particular time does not rebut plaintiffs' proposed finding that spearing has religious and cultural significance to the Chippewa.

[3] Defendants have submitted affidavits of experienced fishers who claim that it is not necessary, or even wise, to stand in a boat to spear, or to wear a helmet with a lamp, or to use a spear as long as ten feet. This does not put into dispute plaintiffs' proposed finding that standing in a boat with a ten foot spear and wearing a miner's helmet is the way that the Chippewa do spear, and that high wakes interfere with this practice.

interfere with spearing became widespread. Stop Treaty Abuse-Wisconsin encouraged as many people as possible to gather at boat landings and on lakes. The group supported the assembling of boats around launching areas while plaintiffs were trying to launch their boats. At Catfish Lake in 1989, Stop Treaty Abuse members and others encircled the launch area with 35 to 40 protest boats to make it more difficult for Lac du Flambeau to launch their boats.[4]

It was one of Stop Treaty Abusers objectives to get as many boaters as possible driving back and forth on the lakes in an effort to disturb Lac du Flambeau spearers attempting to exercise their fishing rights. At protests organized by Stop Treaty Abuse Wisconsin, members and others intentionally created high wakes to interfere with spearers who were attempting to exercise their off-reservation spearing rights.[5]

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[4] Defendants try to put this fact into dispute by asserting that plaintiffs were never actually prevented from launching their boats, but were only blocked temporarily. Defendants' effort fails.

[5] Defendants attempt to create a genuine issue about this fact by asserting that it is disputed whether the wakes made by Stop Treaty Abuse members were any higher than the normal wave level that may be encountered on any given lake and whether any wakes so created were hazardous in nature and intended to interfere with spearers. They support their assertions with affidavits, including one of defendant Crist, in which Crist avers that

> he has operated a boat on numerous lakes on occasions when Indian spear fishing was occurring and that in the course of such operation, his boat has inevitably created a wake as it moved through the water and that the size of such wakes was not necessarily larger than the size of waves created on the surface of the lakes by a brisk wind.

Affidavit of Dean Crist, Nov. 11, 1991, at 5. By itself, this affidavit does not put into dispute the proposed finding that defendants created high wakes intentionally to interfere with spearers efforts to exercise their treaty rights. A wake "the size of waves

(continued...)

On at least three occasions in 1989, Stop Treaty Abuse announced it would pay fines for all persons who crossed police lines at launching areas. At Rainbow Flowage in 1989, Stop Treaty Abuse members crossed police lines to occupy the area where the plaintiffs were launching their boats. In May 1989, Stop Treaty Abuse members and others crossed police lines at Trout Lake to the area in which the plaintiffs were launching their boats. Later, Stop Treaty Abuse paid the court costs of all the persons arrested. In 1990, Stop Treaty Abuse encouraged members and others to cross police lines at Big St. Germain Lake.

Also in 1989, Stop Treaty Abuse discussed with its members and others the spraying of rocks with insect repellant and the use of blunted hooks as drifting anchors to interfere with plaintiffs' treaty-protected right to use gill nets. The group put together and distributed protest kits that included steel whistles for use by protesters at boat landings in 1991.

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[5] (...continued)

created . . . by a brisk wind" will interfere with a spearer trying to fish on an otherwise calm lake while standing in a boat. As Crist admitted in his deposition, spearers need calm water if they are going to spear from a boat. Deposition, Feb. 26, 1991, at 130, 132.

To the extent that Crist attempts to contradict his earlier, explicit deposition testimony concerning his efforts to create rough water conditions by filling "the back live wells and driving [his boat] half throttle (which creates greater displacement of water)" deposition, Feb. 26, 1991 at 131, and that driving in such a water is an effective way in which to minimize the spearing of fish, *id.*, his affidavit must be ignored. *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 861 (7th Cir. 1985) (district court has duty to ignore sham issues in determining appropriateness of summary judgment; parties are not allowed to create credibility issues by contradicting their own prior testimony). *See also Lovejoy Electronics, Inc. v. O'Berto*, 875 F.2d 1001, 1005 (7th Cir. 1989) (same).

The purpose of the on-water protests and the protests at the boat landings was to stop the plaintiffs' exercise of their right to engage in off-reservation spearing of walleye and muskellunge.[6] The goal of Stop Treaty Abuse-Wisconsin has been to stop the plaintiffs from exercising their treaty recognized right to spear fish, by doing everything in its power to stop plaintiffs' spearing.

At Stop Treaty Abusers major rally in 1991 at Minocqua, leaders encouraged participants to protest that night (April 20) at Sand and Dam Lakes. That night at the Sand and Dam Lake boat landings, a mob of protesters surrounded a small group of Indians, shouted threats and racial slurs at them, pushed in on them and blew whistles in their ears.

Stop Treaty Abuse had an information network for gathering information about spearing activities and for disseminating such information.

Defendant Crist decided where Stop Treaty Abuse would protest. It was his stated policy to crowd the boat landings with people and vehicles to make it more difficult for spearers to launch boats, to use artificial decoys to interfere with spearing, to get as many boaters as possible driving

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[6] Defendants try to put this fact into dispute by arguing that their primary effort was to save walleyes. However, defendant Crist's deposition testimony is unequivocal: the way to stop the walleye catch was by preventing plaintiffs from fishing. *See* deposition, Feb. 26, 1991, at 36 (Stop Treaty Abuse planned to "do our level best to minimize the unfair exploitation of Wisconsin resources by the Chippewa . . . if possible we would like to stop the harvest"); at 39 (Stop Treaty Abuse planned "to crowd boat landings with people and vehicles to make it more difficult for spearers to launch boats"); at 39-40 (Stop Treaty Abuse "encouraged the use of artificial decoys to interfere with spearing in 1989"); at 70-72 ("we are going to take one county, one weekend, and do our damnedest to stop it"). Defendant Crist's conclusory statements to the contrary in his Nov. 11, 1991 affidavit do not create a genuine issue of fact.

back and forth on the lakes making waves to make it difficult for spearers to stand in their boats and to see the fish. At a Stop Treaty Abuse meeting in April 1989, he advised members on techniques for interfering with Chippewa spearing. He has stated, "our efforts to hinder the tribal spearing and netting harvest won't be stopped . . . ." "Every fish saved from the spearers will mean an extra fish for the sport anglers . . . that is why disturbing spearers will be effective." Deposition of Dean Crist, Feb. 26, 1991, at 110-112.

Defendant Crist made wakes on lakes where Lac du Flambeau members were spearing on almost every evening that there was spearing in 1989 and 1990. He did so intentionally, in an effort to impede spearing. In 1989, at Minocqua Lake, Trout Lake and Big Arbor Vitae Lake, defendant Crist participated in on-water protests against Chippewa gill netting. At Big Arbor Vitae Lake in 1989, Stop Treaty Abuse members, including defendant Crist and others, formed a flotilla of boats around the launching area while spearers tried to launch their boats. At Plum Lake in 1990, defendant Crist and other Stop Treaty Abuse members, including board member David Worthen, made high wakes while plaintiff Nick Hockings was trying to spear. Defendant Crist was in a large assemblage of boats clustered around the boat landing at Catfish Lake in 1990, as Lac du Flambeau spearers attempted to launch their boats.

Stop Treaty Abuse paid defendant Crist's fines and legal fees in connection with his arrests at Rainbow Flowage and Trout Lake in 1989 and paid his legal fees in connection with his arrests at Plum Lake in 1989 and 1990, at Big St. Germain Lake in 1990, and at Catfish Lake in 1990.

In January 1991, defendant Crist drove his truck onto a frozen lake to observe a Chippewa spearer and to circle the spearer in his truck.

Defendant Crist believes that Stop Treaty Abuse has been effective in minimizing plaintiffs' fish harvest.

In 1989 or 1990, defendant Handrick was in a pontoon boat at Minocqua Lake with Al Soik, Elaine Soik, Lois Pavlovich, Charles Ahlborn, Jack Lanta and Rose Lanta protesting Chippewa gill netting. The pontoon boat approached close enough to Lac du Flambeau gill netters to make physical contact. In 1989, at Big Arbor Vitae Lake, defendant Handrick participated in an on-water protest against Chippewa gill netting. Defendants Handrick and Crist were part of an assemblage of boats that encircled the landing at Catfish lake as Lac du Flambeau, spearers tried to launch their boats. Defendant Handrick crossed police lines at Trout Lake in 1989 together with other Stop Treaty Abuse protesters. Stop Treaty Abuse paid his legal fees. Defendants Crist and Handrick have operated boats or been passengers in boats that made wakes within 500 feet of boats in which Lac du Flambeau members were trying to spear. In 1990, defendant Handrick was in a boat with defendant Crist on Big Arbor Vitae Lake protesting Lac du Flambeau gill netting.

On occasions during 1989 and 1990, protesters pelted spearers, their family members and friends with stones. On many occasions during the 1989 and 1990 spearing seasons, protesters crowded groups of Indians, subjecting them to unwanted physical contact while blowing whistles, shouting threats, racial slurs and insults.

At Star Lake in 1990, protesters blew whistles in the ears of Anita Thoms Koser, blocked her way to prevent her from reaching the lake where she intended to perform a religious ritual, surrounded her and tried to force her to buy a Stop Treaty Abuse button. In 1991, at Lake Nakomis, protesters assaulted her again by blowing whistles at her at close range:

Protesters at landings in 1989 and 1990 threatened spearers and their families with violence. At protests organized by Stop Treaty Abuse, members and others have interfered with plaintiffs' right to practice their religion and have prevented them from sharing fishing activities with their children and other members of their band.

At the Stop Treaty Abuse rally in Torpy Park in Minocqua in 1990, the speaker's podium featured a caricature of an Indian.

Stop Treaty Abuse literature prepared by defendant Crist, Charles Ahlborn and Al Soik for distribution to members and the public is filled with inflammatory statements about the plaintiffs, such as

a. Chippewa spearers use spears "mass produced in China and Korea," and outboard motors "manufactured in Japan";

b. Many speared fish are sold;

c. "Thousands of fish spoil because of warm weather and the lack of ambition to clean them. Each year thousands of spoiled game fish are dumped in dumps and along road sides because tribal member [sic] didn't want to clean them";

d. Tribal members receive "huge amounts of free government surplus food including cheese, butter, milk and other vast amounts of 'commodity' foods. Along with these free foods they receive free food stamps and a cost of living allowance of over $20,000/household/year. They are also eligible for free government housing, subsidized heat and light, a whole list of government entitlement and subsidies, and a host of other government benefits. Tribal members receive 100% free medical and dental care, free pharmaceutical coverage, free day care and free and complete educational subsidies.

Al Soik is a former chairman and current vice-chairman of stop Treaty Abuse. He often led protesters in chants using a bullhorn. He did so

> as a satirical means of pointing out the anachronistic and inappropriate nature of allowing a practice established in an era of birchbark canoes, flaming torches, and hardened wood spears to be conducted with the aid of pickup trucks, aluminum and fiberglass boats powered by outboard motors, high-powered headlamps, and steel-tined spears . . . .

Affidavit of Al Soik of October 30, 1991 at 2-3. Soik has chanted, "Tom, Tom, the white man's son," as a means of drawing attention

> to what he believes is the hypocritical and contrived nature of the invocation of Indian heritage and tradition by Maulson and other members of a tiny band of spiteful and irresponsible individuals to justify the rape and destruction of a resource and that the chant was not intended to be demeaning of Indians in general.

Id. at 3.

Elaine Soik is a member of Stop Treaty Abusers board of directors. Charles Ahlborn is a former chairman of Stop Treaty Abuse. David Worthen is a member of Stop Treaty Abusers board of directors. Al Soik, Elaine Soik, Charles Ahlborn and defendants Handrick and Crist have "chanted Tom, Tom, the white man's son" and "Hi-How-are-yall to the mock beat of a tom-tom at the boat landings with other protesters. David Worthen has a notice in his pub in the form of a help wanted ad that reads, "Small Indians wanted for mudflaps. Must be willing to travel." Defendant Crist is aware of the notice.

In 1990, at Big St. Germain Lake, defendant Handrick said, "Here comes another fucking Indian on relief," as Donald Smith arrived.

OPINION

In the order entered herein on March 15, 1991, I found that plaintiffs had demonstrated a likelihood of success on their claims that defendants had violated plaintiffs' rights under 42 U.S.C. §1982, 1985(3) and 1986. *Lac du Flambeau Band,* 759 F. Supp. 1339. Based on the facts that I have found to be undisputed, I hold now that plaintiffs have established the violations of their rights under 42 U.S.C. §1982, and are entitled to the entry of a permanent injunction. (This resolution makes it unnecessary to reach the issue of plaintiffs' rights under §1985(3) and 1986 or state law.) Defendants have failed to show the existence of a genuine dispute about any of the facts material to a decision on plaintiffs, §1982 claim. There is no need for a trial; plaintiffs are entitled to injunctive relief as a matter of law.

> [Fed. R. Civ. P.] 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

A. Section 1982

42 U.S.C. §1982 guarantees all citizens of the United States the same rights enjoyed by white citizens to "inherit, purchase, lease, sell, hold and convey real and personal property," and forbids both official and private interference with such rights. I have previously held in this case that the Lac du Flambeau band's right to exercise its usufructuary rights in the ceded territory is a property right. *Lac du*

Flambeau Band, 759 F. Supp. at 1350. Defendants argue, however, that treaty rights cannot be subject to the protection of §1982 because "(protection of an exclusive right to engage in hunting and fishing activity claimed by a political entity has no bearing on 'equality between persons of different races. It does not contribute to I eliminating all discrimination and the effect thereof on the ownership of property.' "

Defendants base their argument on a case holding that preferential treatment for tribal members is not racially discriminatory since it is rooted in a political relationship. *Morton v. Mancari*, 417 U.S. 535 (1974) (establishment of preference for hiring Indians in the Bureau of Indian Affairs not unconstitutional or violation of the Equal Employment Opportunities Act of 1972). However, cases addressing the constitutionality of special hiring preferences for Indians are irrelevant. That the federal government may establish special preferences *in favor of* Indians without running afoul of the requirements of the Constitution or of federal anti-discrimination statutes because of its political relationship with Indians does not mean that private persons are free to discriminate *against* Indians for the same reason.

The issue in this case is the right to hold (and enjoy) one's own property and the question is whether defendants have violated that right of plaintiffs, which is the same right enjoyed by white citizens. Defendants argument comes down to an assert ion that plaintiffs are not entitled to the benefit of §1982, because their usufructuary right to fish, hunt and gather is an unusually valuable right and one not available to non-members of the tribe. There is no merit to this assertion. Neither the relative values of property nor the particular nature of the property are relevant to the lawful owner's right to use and enjoy the property without

illegally discriminatory interference. Just because a Van Gogh painting might be worth $10 million does not mean that its owner is not entitled to the protections of §1982, that is, to be free of discriminatory interference with his right to hold and enjoy his painting.

A prerequisite to recovery under §1982 is a showing that the plaintiffs have been subjected intentionally to discrimination because of their ancestry or their ethnic characteristics. *See Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987); *Saint Francis College v. Al-Khazraii*, 481 U.S. 604 (1987). Defendants contend that no such showing can be made here because the undisputed facts do not demonstrate that a racial animus has been the motivating factor in the defendants' efforts to prevent plaintiffs from exercising their treaty-protected usufructuary rights.

The initial question is whether race must be the motivating factor or merely *a* motivating factor. Defendants say race must be the sole motivation and cite *Stevens v. Tillman*, 855 F.2d 404 (7th Cir. 1988). However, *Stevens* makes no reference to the question and provides no guidance. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977) held that at least where official action is involved, a plaintiff suing under 1982 need prove only that "a discriminatory purpose has been a motivating factor in the decision." *See also Smith v. Sol D. Adler Realty Co.*, 436 F. 2d 344, 349-50 (7th Cir. 1970): "race is an impermissible factor in an apartment rental decision" by private landlord that "cannot be brushed aside because it was neither the *sole* reason for discrimination nor the total factor of discrimination." (Emphasis in original). Defendants do not cite any case overruling *Arlington Heights* or *Smith*, and I can find nothing that suggests that §1982's requirements have been changed to make it necessary to show that discrimination was the sole motivating factor for a defendant's interference with a plaintiff's property rights.

Plaintiffs have adduced compelling evidence of defendants' racially-motivated animus. Defendants mounted a caricature of an Indian on the lectern at their largest rally. One member of Stop Treaty Abuse displayed a "Help Wanted" poster in his bar, seeking "Small Indians for use as mudflaps." Stop Treaty Abuse disseminated a brochure replete with stereotypical images of Indians as lazy, wasteful and receiving munificent welfare benefits. The brochure perpetuated the baseless rumor that Indian households receive $20,000 a year as a cost of living allowances.[7] It also gave currency to the unproved assertion that the Chippewa do not need the fish they spear for sustenance, but throw them away to rot after catching them. Stop Treaty Abuse members, including defendants Crist and Handrick, mocked Indian chants. By his own admission, Stop Treaty Abuse member Al Soik disparaged and held up for public ridicule the plaintiffs' spearing practices and characterized plaintiffs' assertions of the religious and cultural aspects of spearing as hypocritical.

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[7] The statements in the brochure are the rural version of the "urban legends" that Jan Harold Brunvand writes about in "The Vanishing Hitchhiker," and "Curses! Broiled Again!" (1989). According to Brunvand, a distinguishing feature of an urban legend is that no one is ever able to produce an eyewitness to the actual event—only a "friend of a friend." Another is that the stories crop up over and over again, in many different settings. The same is true about the oft-repeated legend that the Chippewa receive allowances from the government of over $20,000 a year. As plaintiffs point out, defendants are unable to cite any provision in the law for such allowances.

Although defendant Crist was questioned at length about the sources of the statements in the brochure, he was uncertain about many of them and unable to identify any statement for which he had first-hand knowledge or as to which he had made any effort to confirm its accuracy, with the one exception that he claimed to have seen Japanese-manufactured outboard motors on some spearers' boats and "Made in Japan" or "Made in Korea" stamped on some spears.

Despite their assertions to the contrary, Stop Treaty Abuse and its members exhibit racist motives and actions in their opposition to Indian spearing. Perpetuating and encouraging stereotypes of persons as lazy or wasteful and ridiculing their religious and cultural practices are classic forms of racism that enable the perpetrators not only to rationalize the oppression of such people but to reinforce identification with the dominant group. *See generally*, Kimberle Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L.Rev. 1331 (1988), and sources cited therein.

As I noted in the March 1991 order, it is disingenuous for defendants to argue that they are trying to prevent the Lac du Flambeau from spearing or gill netting only because they oppose those activities and not because they are biased against Indians in general. Defendants have not pointed to any other instance in which they have acted against a threatened harm to the fishing environment. It is impossible to escape the conclusion that it is the coalescence of a perceived harm *and* the minority source of that harm that produced the defendants' reaction. This is not unusual. Instances of racial discrimination rarely occur until and unless a minority group acts to exercise its rights. *See New York State NOW v. Terry*, 886 F.2d 1339, 1359 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 2206 (1990):

> In most cases of invidious discrimination, violations of constitutional rights occur only in response to the attempts of certain members of a class to *do* something that the perpetrators found objectionable. . . . It is sophistry for defendants to claim a lack of class-based animus because their actions are directed only against those members of a class who choose to exercise particular rights but not against class members whose actions do not offend them (citation omitted; emphasis in original).

B. Sections 1985(3) and 1986

Section 1985(3) reaches conspiracies formed for the purpose of depriving any person or class of persons of a constitutionally protected right. It provides no substantive right itself, but merely provides a remedy for the violation of rights. *Marino v. Bowers*, 657 F.2d 1363 (3d Cir. 1981). The rights must be federally protected ones to which the plaintiff is entitled to protection against anyone; not mere prohibitions against impairment by the state. *Cohen v. Ill. Institute of Technology*, 524 F.2d 818, 828 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976). For example, a private conspiracy to discriminate irrationally between similarly situated persons is not actionable. *Dombrowski v. Dowlinci*, 459 F.2d 190 (7th Cir. 1972). *See also United Brotherhood of Carpenters v. Scott*, 463 U.S. 825 (1983).

The federally protected right that plaintiffs claim to have been deprived of is their right to enjoy their property rights, a right guaranteed them under §1982. Since I have already found that defendants violated plaintiffs' rights under that statute, there is no need to consider whether defendants might have conspired to do so. The act of conspiracy creates no additional liability in and of itself; it merely serves as a means of assessing liability against persons who may not have acted independently to violate plaintiffs' rights. Proving the existence of a conspiracy is unnecessary in this case, in which there is clear evidence of each defendant's liability for violation of §1982.

The same analysis applies to plaintiffs' claim under §1986, which covers persons who fail to prevent or aid in the prevention of the commission of wrongs conspired to be done, although they have power to do so.

C. State Law Claims

It is unnecessary to consider whether plaintiffs have established defendants' violation of Wis. Stat. §§844.01(3) (interference with real property), 29.223 (interference with lawful fishing) and 813.125 (harassment), because I have found that they are entitled to an order granting them permanently the injunctive relief they were granted preliminarily in March 1991.

D. Nature of Injunction

As I stated in the March 1991 order granting plaintiffs' motion for a preliminary injunction, the injunctive relief they seek is not intended to reach the defendants' verbal expression of their views. It is intended only to enjoin defendants from physical interference with plaintiffs' exercise of their treaty-protected fishing rights.

ORDER

IT IS ORDERED that plaintiffs' motions to strike the supplementary brief and affidavit filed by defendants Stop Treaty Abuse Wisconsin, Inc. and Dean Crist in opposition to plaintiffs' motion for summary judgment and to strike defendants' untimely motion for summary judgment are GRANTED; the motion of defendants Stop Treaty Abuse-Wisconsin, Inc. and Dean Crist for leave to file a second amended answer is DENIED; and plaintiffs' motion for summary judgment is GRANTED as to all of the named defendants.

The Clerk of Court is directed to enter judgment in favor of plaintiffs against defendants Stop Treaty Abuse-Wisconsin, Inc., Dean Crist and Tommy Handrick as follows:

Defendants Stop Treaty Abuse-Wisconsin, Inc., Dean Crist and Tommy Handrick and all those acting in concert with or at the direction of these defendants are enjoined permanently from

a) Assaulting or battering any member of the Lac du Flambeau band or any member of the family of a Lac du Flambeau band member at any landing or on any lake within the ceded territory;

b) Intentionally creating wakes on any waterway to interfere with any spearer;

c) Planting decoys in any waterway;

d) Intentionally blocking spearing boats from moving from the boat landings out to the spawning beds;

e) Shining lights into the eyes of any spearer or spearing boat operator while on the water;

f) Playing "leapfrog" with any spearing boat, or otherwise impeding the progress of any spearing boat; and

g) Taking any other action that is intended to or may reasonably be expected to interfere with plaintiffs' exercise of their spearing rights, including blowing whistles at spearers or any members of their families.

FURTHER, IT IS ORDERED that this action is dismissed with respect to "unknown John Does and Jane Roes" for plaintiffs' failure to identify and serve these defendants.

Entered this 6th day of January, 1992.

BY THE COURT:

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BARBARA B. CRABB
District Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 92-1315, 92-2672[1]

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, MICHAEL ALLEN, WA-SWA-GON TREATY ASSOCIATION, THOMAS MAULSON, ROBERT MARTIN, NICK HOCKINGS, and GILBERT CHAPMAN,

Plaintiffs-Appellees,

v.

STOP TREATY ABUSE-WISCONSIN, INC., and DEAN CRIST,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 91-C-117-C—**Barbara B. Crabb,** *Chief Judge.*

ARGUED SEPTEMBER 11, 1992—DECIDED APRIL 14, 1993

Before BAUER, *Chief Judge*, MANION, *Circuit Judge*, and MOODY, *District Judge.*[2]

MOODY, *District Judge.* In this consolidated appeal, Dean Crist and Stop Treaty Abuse-Wisconsin, Inc. ("STA") appeal from the district court's judgment granting permanent

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[1] After preliminary review of the briefs in Case No. 92-2672, the court notified the parties that it would be decided by the same panel that had heard oral argument in Case No. 92-1315, and that the court had tentatively concluded that oral argument in No. 92-2672 would not be helpful. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Fed.R.App.P. 34(a); Circuit Rule 34(f). No such statement having been filed, the appeal has been submitted and decided on the briefs and record.

[2] The Honorable James T. Moody, United States District Court Judge for the Northern District of Indiana, sitting by designation.

injunctive relief to plaintiffs-appellees on a claim under 42 U.S.C. § 1982, and entry of judgment for fees and costs to plaintiffs-appellees pursuant to 42 U.S.C. § 1988. They also seek reversal of several interlocutory decisions made by the district court. We affirm the interlocutory decisions, but find the district court erred in granting summary judgment when it resolved a disputed issue of material fact against STA and Crist—whether STA and Crist's harassment of plaintiffs-appellees was racially-motivated. Thus, we reverse the district court's order granting summary judgment, vacate both final judgments, and remand for further proceedings consistent with this opinion. On remand, the preliminary injunction that was granted by the district court is reinstated.

I. FACTS

The Lac du Flambeau Band of Lake Superior Chippewa Indians ("LDF") is one of the several Chippewa bands which possess treaty-retained usufructuary rights to engage in off-reservation hunting, fishing, trapping and gathering on public lands in the northern third of Wisconsin. The existence and exercise of these usufructuary rights has been controversial. Another panel of this court affirmed the present vitality of the treaties and concomitant ability of the Chippewa to exercise the rights in *Lac Courte Oreilles v. Voigt*, 700 F.2d 341, *appeal dismissed and cert. denied sub nom. Besadny v. Lac Courte Oreilles*, 464 U.S. 805 (1983). In the present case plaintiffs-appellees seek to enjoin interference with their exercise of fishing rights. Plaintiffs-appellees are the LDF, suing on behalf of all of its members, the LDF's president, a treaty support group and four individual LDF members who engage in off-reservation fishing.[3]

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[3] For convenience, the remainder of this discussion will use "LDF" as a reference to the Band collectively with all plaintiffs-appellees, and, where the context connotes, as a reference to members of the band who spear. "STA" will be used to refer to both defendants-appellants, except in cases where defendant-appellant Crist is mentioned separately.

Dean Crist is a Wisconsin resident who believes, to put it mildly, that we decided *Voigt* wrongly. He is concerned mainly with the right of the Chippewa to take fish by spear and by net: highly efficient fishing methods prohibited by law for all other anglers. According to Crist, at the time the treaties were entered into, the Chippewa used primitive equipment to spear fish: hand-paddled birch-bark canoes, fragile, hand-carved wooden spears and flaming torches. This made the harvest of fish difficult, and the number taken few. Now, aluminum fishing boats powered by outboard motors are used. Sealed beam automobile headlamps carried in the boats provide illumination, and metal-tined spears minimize lost time due to breakage.

These modern conveniences, unknown when the treaties were formed, make the treaties invalid, Crist believes, or are at least a reason why the treaties should be abrogated. Crist's beliefs are explained at length in a pamphlet he authored for STA entitled "Wisconsin's Treaty Problems—What Are The Issues?" The pamphlet also serves to explain in part STA's corporate purpose.

STA is a for-profit Wisconsin corporation formed by Crist and others who share his disgust with the *Voigt* decision and object to treaty rights, especially spearing. Crist occupies the position of "spokesman" in the STA organizational structure.[4] STA encourages "boat landing protests" at off-reservation sites where LDF members spear. According to the STA pamphlet written by Crist, the protests are for the purpose of "send[ing] the message to Madison and Washington, D.C. that we need the treaty problems in Northern Wisconsin resolved." Crist engages in activities, which STA encourages, to "save fish" by interfering with the LDF's spearing. The line separating protesting from saving fish is imperceptible.

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[4] This apparently is an important office in STA's corporate hierarchy. Crist was the individual who answered all discovery requests directed to the corporation. In addition to Crist, the other corporate officers of STA were named as defendants. All but one settled; only Crist and STA continue to litigate.

The protesting/fish saving which caused the LDF to seek an injunction has not been peaceful. Protestors, some of whom are associated with STA but many of whom are perhaps not,[5] have harassed the LDF to make spearing unpleasant, dangerous and/or impossible. The district court's order granting summary judgment provides a comprehensive description of the harassment. *Lac du Flambeau v. Stop Treaty Abuse-Wisconsin, Inc.*, 781 F.Supp 1385 (W.D. Wis. 1992). In brief, the protestors blew steel whistles (obtainable in a "protest kit" sold by STA) directly into the ears of LDF spearers and their accompanying family members and friends. The protestors crowded landings to make launching boats difficult, and, for the same purpose, formed flotillas of boats around the landings. They operated their boats in a manner intended to create wakes so that LDF members could not stand in their boats to spear. STA sponsored a contest to encourage production of concrete fish decoys which could be used to cause damage to the metal spears. On occasion, rocks were thrown at the spearers.

Not satisfied merely with physically interfering with the spearing, the protestors also injected racism into the harassment. They hurled vile racial insults, such as "timber-nigger" and "welfare Indian" at the spearers, chanted "hi-how-are-ya" to the beat of tom-toms and engaged in other mockery of Indian culture and tradition. The STA pamphlet authored by Crist contains bigoted racial stereotypes; for example, that each year "thousands" of fish caught by the spearers spoil because of "the lack of ambition to clean them." At a STA-sponsored rally, the speaker's podium featured an unflattering caricature of an Indian.

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[5] Portions of the record, mainly answers to interrogatories directed to STA and the transcript of Crist's deposition, reveal that association with STA is a slippery concept. STA considers anyone who makes a "donation" to be a "member." It does not appear that any rights, privileges or responsibilities attach upon becoming a member. No membership roll is kept, making it impossible to identify all of the members, or to dispute a claim of membership. As a result, every protestor may have been a member.

II. PROCEEDINGS BELOW

On February 1, 1991 the LDF filed suit seeking a permanent injunction to stop STA's interference with LDF fishing, asserting claims under 42 U.S.C. §§ 1982, 1983, 1985(3), 1986 and pendent state claims under Wis. Stat. §§ 844.01, 29.223 and 813.125. No damages were sought, only injunctive relief. The LDF also moved for a preliminary injunction when the complaint was filed.

On March 4 STA moved that the district judge disqualify herself due to prior involvement in the *Voigt* litigation and requested a jury trial. The judge heard the motion for disqualification on March 5, orally denied it at the hearing, and entered a written order of denial on March 6. On March 7 the judge conducted a hearing on the LDF's motion for a preliminary injunction. On March 15 the preliminary injunction was granted. *Lac du Flambeau v. Stop Treaty Abuse-Wisconsin, Inc.*, 759 F.Supp 1339 (W.D. Wis. 1991).[6] STA did not appeal from the preliminary injunction.

On October 2 STA moved to amend its answer to assert a new defense. On October 15 the LDF moved for summary judgment on each of its claims. On October 31 the judge conducted a motion hearing and denied STA's motion to amend and earlier request for a jury trial. STA's request for additional time to file a responsive brief to the LDF's motion for summary judgment was granted.

Despite the additional time, after briefing on the motion was complete, STA on December 2 sought leave to file a supplemental response to the motion for summary judgment. The LDF moved to strike the supplemental response. On December 24 STA again sought leave to amend

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[6] The preliminary injunction was entered against other "private" defendants in addition to appellants. With the exception of one party who has not participated in this appeal, those other defendants were all dismissed after settling with plaintiffs.

The preliminary injunction was denied as to several law officers named as defendants, who were later dismissed from the action.

its answer, this time to include the additional defense raised in the supplemental response as well as the defense raised in the previously-denied motion to amend.

In an order dated January 6, 1992 the district judge granted the motion to strike the supplemental brief, denied the motion for leave to amend, granted summary judgment on the LDF's § 1982 claim, and ordered entry of final judgment granting permanent injunctive relief. 781 F.Supp at 1395. Because the district court was able to grant complete relief by deciding only the § 1982 cause, the other LDF claims were dismissed. On January 27, 1992 a final judgment permanently enjoining STA from interfering with the LDF's exercise of fishing rights was entered, with terms identical to the preliminary injunction. 781 F.Supp at 1395-96. A separate judgment for fees and costs was entered on July 17, 1992 in favor of the LDF as a prevailing party pursuant to 42 U.S.C. § 1988.

III. ANALYSIS

STA argues that several interlocutory decisions made by the district court were erroneous and require reversal, as does the district court's order granting summary judgment, making it necessary to vacate the final judgments entered against STA. The issues raised are: 1) whether the district court abused its discretion in denying STA's request for a jury trial, 2) whether the district court abused its discretion in denying STA's motion for disqualification, 3) whether the district court abused its discretion in refusing to allow STA leave to file an amended answer and supplemental response to the LDF's summary judgment motion, 4) whether usufructuary fishing rights are "property" within the meaning of that term under § 1982, 5) whether affidavits filed in support of the LDF motion were so deficient as to preclude a grant of summary judgment, 6) whether the district court's holding impermissibly restricts speech, in violation of first amendment (as explained below, a somewhat incomprehensible argument), 7) whether disputed issues of material fact precluded summary judgment, and 8) whether the LDF is a "prevailing

party" entitled to attorneys' fees or whether the cost and fees awarded are excessive.

We find that the grant of summary judgment must be reversed, which requires vacating the judgment for fees making the issues raised in that appeal moot. The interlocutory issues raised in the appeal from the decision on the merits are not moot, however, and we address them to avoid needless proceedings on remand. *Weir v. Propst*, 915 F.2d 283, 286 (7th Cir. 1990). We turn first to the issues collateral to the merits of the § 1982 cause of action.

A. STA's Right to a Jury Trial

STA's argument that the district court abused its discretion by denying STA's request for a jury trial is so cursory it borders on being frivolous. In this action the LDF sought only an injunction, no monetary damages. It is beyond question that a right to a jury trial does not attach to actions seeking only equitable relief. *United States v. Louisiana*, 339 U.S. 699 (1950). We have had little success in locating any decision where this principle has been questioned; STA's research efforts apparently fared no better.

Citing no authority,[7] a violation of Fed.R.App.P. 28 and reason alone to reject the argument, STA argues that the award of attorneys' fees available to plaintiffs who succeed under § 1982 is a "de facto award of damages." The size of the potential award in the present case, STA argues, should have been "recognized as justification" by the district court "to exercise discretion" to allow a jury trial. STA's failure to make this argument in the district court is waiver, as is its failure to develop the argument before us. *Wigod v. Chicago Mercantile Exchange*, 981

[7] STA cites only Fed.R.Civ.P. 39. Subsection (c) of Rule 39 allows the court discretion to conduct a jury trial of actions where there is no right to a jury trial only "with the consent of both parties." The LDF not having consented in this case, STA has provided no applicable authority.

F.2d 1510, 1519 (7th Cir. 1992); *Churchill v. Waters*, 977 F.2d 1114, 1120 n.6 (7th Cir. 1992); *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991).

The absence of support for STA's argument is telling, and we choose not to do STA's research work. Given the LDF's non-acquiescence to the jury demand and the language of Fed.R.Civ.P. 39, it is doubtful the district court even had discretion to allow a jury trial. Besides, we flatly disagree with the logic of STA's position. "Abuse of discretion" is a highly deferential standard of review, applied by an appellate court to a district court's decision only if it is "fundamentally wrong." *Anderson v. United Parcel Service*, 915 F.2d 313, 315 (7th Cir. 1990). Not exercising discretion is not the same as exercising discretion abusively. It would be an extremely unlikely event, we think, to reverse a judge for failing to "recognize a justification" to exercise discretion in the first place. Hypothesizing aside, this is not that event.

B. STA's Motion for Disqualification

The district court also did not abuse its discretion in denying STA's motion for disqualification. STA moved for disqualification pursuant to 28 U.S.C. §§ 455(a) and (b)(1). Subsection (a) requires disqualification where "impartiality might reasonably be questioned;" subsection (b)(1) where the presiding judge has "personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

STA's appellate brief does not indicate whether it disagrees with the district court's ruling under one or both of the subsections, but appeal of the decision under subsection (a) does not fare well. The rule in this circuit is well-established that a party moving for disqualification under § 455(a) must immediately move for a writ of mandamus in the event the district judge denies the motion. *United States v. Towns*, 913 F.2d 434, 443 (7th Cir. 1990) (collecting cases). That having not been done here, the

argument is waived, and we give it no further consideration. *Id.*

Appeal of a denial of a motion under subsection (b)(1) is not preconditioned on a writ of mandamus, however, so we proceed. Appellate review of the district judge's decision regarding disqualification under (b)(1) is *de novo*; the question is whether a reasonable person would be convinced the judge was biased. *Taylor v. O'Grady*, 888 F.2d 1189, 1201 (7th Cir. 1989); *United States v. Balistrieri*, 779 F.2d 1191, 1202 (7th Cir. 1985), *cert. denied sub nom. DiSalvo v. United States*, 475 U.S. 1095 (1986). In this case, to ask this question is to answer it.

STA's argument that the district judge had "personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts" is simple: due to previous involvement in the *Voigt* case and many other cases involving treaty rights, the judge must be biased against anyone protesting against the existence of those rights. STA also argues that in the *Voigt* litigation the district judge found as fact that Chippewa spearers had been subjected to violent and lawless acts by "protestors." STA believes this is personal knowledge of a fact disputed in this litigation, or at least a suggestion of potential bias or prejudgment by the district judge that they, as admitted protestors against spearing, had themselves engaged in the acts in question.

During a telephonic hearing on the motion for disqualification, the district judge stated:

> The findings I made in June of 1989 [in the *Voigt* case] were directed to the facts that were in front of me at that time. I found that there were some actions by some protestors that were as I described. I didn't make findings that those protestors were specific individuals, that they were members of specific groups. Even if I had, I don't think that would make any difference at this time. But I didn't. . . . what I found in June 1989 is probably completely irrelevant . . . I'm certainly not going to go back to any

> of my notes from 1989. This is a different case. These are different lawyers. They are going to be putting in proof on Thursday [at the hearing on the motion for a preliminary injunction] which is going to be the basis for the rulings. And I will focus my rulings solely on the proof that is before me on Thursday and not on anything else that may have gone on in another lawsuit that is tangentially related to this one.

Tr. of hearing, Mar. 5, 1991, pp. 9-10. The following day the district court entered a written order denying the motion to disqualify finding that "moving defendants adduced no evidence of bias that would lead a reasonable person to question my impartiality in this hearing." Coupled with the judge's earlier comments at the close of the hearing, it is clear that the judge felt she had no personal knowledge of facts in issue, or actual or apparent bias.

"Personal" knowledge of evidentiary facts means "extrajudicial." *Balistrieri*, 779 F.2d at 1202. Facts learned by a judge in his or her judicial capacity regarding the parties before the court, whether learned in the same or a related proceeding, cannot be the basis for disqualification. *United States v. Patrick*, 542 F.2d 381, 390 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977). That being the case, it is difficult to imagine how judicially-learned facts about different parties in a case similar to the one being tried would require disqualification. The district judge made it clear that she did not link the activities of STA and its members to protestor activities she had previously heard evidence of in *Voigt*. No reasonable person would believe the judge personally biased in these circumstances, and denial of the motion to disqualify was not an abuse of discretion.

C. Amendment of Answer and Filing of Supplemental Response

STA sought leave to file a supplemental response to the LDF motion for summary judgment, and twice sought leave to amend its answer. STA desired to assert two

additional defenses. First, that the treaty-retained usufructuary rights no longer exist, due to certain Indian Claims Commission ("ICC") findings made prior to our decision in *Voigt* that compensation had been paid to the LDF to extinguish them. Second, that some plaintiffs and LDF members lack the requisite Indian ancestry necessary to qualify under the treaties to exercise the rights, thus lacking standing in this action. The district court denied STA's requests for leave to amend its answer to raise these defenses, and granted the LDF's motion to strike a supplemental response to its summary judgment motion raising the ICC defense. The district court found that STA had not raised the defenses in a timely manner. Further, the district court found the defenses meritless, our decision in *Voigt* having conclusively determined the existence of the rights and identity of the parties entitled to exercise the rights.

On appeal, STA argues at length that *Voigt* is not a *res judicata* bar to these defenses and therefore the district judge committed reversible error in not allowing the amendments. STA urges us to conduct a *de novo* review, *res judicata* being a question of law. However, STA makes no convincing argument why the district judge abused her discretion in not allowing the amendments and supplemental brief due to their untimeliness. That alone is reason to deny STA's appeal of this issue, and avoids discussion of its convoluted arguments regarding *res judicata*, which, in any event, we find an unpersuasive collateral attack on our earlier decision in *Voigt*. *See Nevada v. United States*, 463 U.S. 110 (1983).

The timing of the disallowed filings was as follows. Early in the case the district judge entered a scheduling order, requiring all amendments to the pleadings to be made by July 1, 1991, and all dispositive motions to be filed by October 1, 1991. On October 2, 1991 STA filed its motion for leave to amend its answer to assert the standing defense, three months after the date for final amendments to the pleadings, one day after the deadline for filing dis-

positive motions,[8] and only four months prior to the scheduled trial. On November 5 the district court denied the motion because it was untimely and meritless.

On December 2, a week after filing its response to the LDF's summary judgment motion and after the LDF filed its reply brief, STA sought to file a supplemental responsive brief raising the issue of the ICC orders. The LDF moved to strike the supplemental brief. On December 24 STA sought leave to amend its answer to include this issue and again the standing defense: this was one month after briefing of the summary judgment motion was complete, and only six weeks prior to trial. In its order of January 6, 1992 granting summary judgment to the LDF, the district court granted the LDF's motion to strike and denied STA's motion for leave to amend, on grounds of untimeliness and because the additional defenses were meritless.

A district court's decision to deny leave to amend a pleading after deadlines for final amendments and for filing dispositive motions have passed is reviewed only for abuse of discretion. *Campbell v. Ingersoll Milling Machine Co.*, 893 F.2d 925 (7th Cir.), *cert. denied*, 111 S.Ct. 127 (1990). The district court will be reversed only if no reasonable person could agree with its decision. *United States v. $103,387.27*, 863 F.2d 555 (7th Cir. 1988). As to the "supplemental" brief in response to the summary judgment motion raising for the first time the ICC defense, a "decision to disregard all materials submitted after a reasonable filing deadline is certainly not an abuse of discretion because it allow[s] the district court to preserve the moving party's right to respond to the resisting party's argument and to decide the summary judgment motion in a timely fashion. *Pfeil v. Rodgers*, 757 F.2d 850, 858 (7th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986).

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[8] That October 1, 1992 deadline was subsequently extended to October 15, 1992. This brief extension does not alter our analysis.

STA's only excuse for raising the additional defenses so late in the proceedings goes only to the ICC defense, and is that research necessary to raise the issue required a difficult and time-consuming search of the National Archives. STA brought this to the district court's attention for the first time on December 24, 1991 when responding to the LDF's motion to strike the supplemental brief. By affidavit, STA's counsel informed the court he had only become aware of the potential defense in late August or early September 1991, and had raised the defense in as timely a manner as possible.

However, STA's counsel did not explain why the defense could not have been discovered earlier, nor why he had not immediately sought to amend or to extend the deadlines for filing dispositive motions, concluding discovery or continuing the trial date. The LDF was of course prejudiced by the delay, as the new defenses were not addressed in its timely October 1 motion for summary judgment. In the absence of the defenses, the motion was potentially dispositive of the litigation. As a result, we cannot say the district court abused its discretion in refusing to allow such untimely amendments and the supplemental brief.

D. Summary Judgment for the LDF on § 1982 Claim

Enacted as part of the Civil Rights Act of 1871, 42 U.S.C. § 1982 guarantees to all citizens of the United States "the same right . . . as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property." 42 U.S.C. § 1982. To prove a violation of § 1982, a plaintiff must demonstrate 1) interference with property rights, which interference is 2) motivated by racial prejudice. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 616 (1987). Racial prejudice need not be the sole motivating factor but must be more than an insubstantial factor bearing on the decision: but for the prejudice, the interference would not have occurred. *Bachman v. St. Monica's Congregation*, 902 F.2d 1259, 1262-63

(7th Cir. 1990); *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344, 349-50 (7th Cir. 1971). The essence of the LDF's cause under the statute is that STA and Crist are not motivated to protest against spearing due purely to concern over conservation of natural resources, but instead because of racial prejudice against American Indians. Thus, the LDF members are being deprived of their right to hold property—enjoy the use of the treaty-retained fishing right—because of their race. STA and Crist deny any race-based animus.

The LDF, in order to obtain summary judgment, was required to demonstrate the absence of any disputed issue of material fact, and show that on those undisputed facts it was entitled to judgment as a matter of law. Fed.R. Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In reviewing the district court's decision, we act *de novo* and apply the same standard used by the district court, affirming only if, after viewing the record and all reasonable inferences to be drawn from it in the light most favorable to the party opposing the motion, the movant must prevail as a matter of law. *Sands, Taylor & Wood Co. v. The Quaker Oats Co.*, 978 F.2d 947 (7th Cir. 1992). In this case, that requires finding that STA and Crist's racial animus is an undisputed fact.

Due to the difficulty of proving a subjective state of mind, cases involving motivation and intent are usually not appropriate for summary judgment. *Kincaid v. Vail*, 969 F.2d 594, 602 (7th Cir. 1992), *cert. denied sub nom. Sceifers v. Vail*, 61 U.S.L.W. 3479 (1993); *Adler v. Madigan*, 939 F.2d 476, 479 (7th Cir. 1991); *Rakovich v. Wade*, 850 F.2d 1180, 1205 n.17 (7th Cir. 1988); *Egger v. Phillips*, 669 F.2d 497, 502 (7th Cir. 1982), *reh'g granted on other grounds*, 710 F.2d 292 (7th Cir.), *cert. denied*, 464 U.S. 918 (1983).

1. Are Usufructuary Rights "Property?"

Irrespective of its motivation, STA argues that treaty-retained usufructuary fishing rights are not "property"

within the meaning of 42 U.S.C. § 1982. STA made the same argument in district court in opposition to the LDF motion for a preliminary injunction. In its well-reasoned treatment of the issue, the district court cited our earlier discussion in *Voigt*, which likened the interest to a *profit a prendre*. 700 F.2d at 352; 759 F.Supp. at 1350. Relying as well on the definition of "property" under Wisconsin statutory law, Wis. Stat. § 840.01, the district court held that the usufructuary right to spear fish is a property interest protected by § 1982.

STA's argument in opposition to the preliminary injunction ended its litigation of this issue in the district court. In its response to the LDF's motion for summary judgment, STA chose not to object to the LDF's showing on this element of its prima facie case. To the contrary, STA's entire argument consisted of two concessionary sentences: "In order for plaintiffs to make their case, they must show they possess a property right protected by 42 U.S.C. § 1982. The court has previously held that the treaty rights are such."

The court's previous holding, being a decision on a motion for a preliminary injunction, was itself only preliminary and subject to revision at any time. *Gould v. Lambert Excavating, Inc.*, 870 F.2d 1214, 1218 (7th Cir. 1989); *Communications Maintenance v. Motorola*, 761 F.2d 1202, 1205 (7th Cir. 1985); *LTD Commodities, Inc. v. Perederij*, 699 F.2d 404, 407 n.6 (7th Cir. 1983). In fact, we have advised district courts to be cautious in adopting conclusions of law made in ruling on a preliminary injunction because the posture of the case at that time inevitably entails incomplete evidentiary materials and hurried consideration of the issues. *Motorola*, 761 F.2d at 1205. Caution is also necessary because a motion for summary judgment raises a different decisional question for the judge than does a motion for a preliminary injunction.

Consideration of the former requires the judge to inquire whether there is any issue of material fact when the facts and inferences therefrom are viewed most favorably to

the non-movant; the latter, whether there is a reasonable likelihood the moving party will prevail on the merits. *Id.* Thus, when the LDF moved for summary judgment, it was incumbent on STA to present its best arguments to the district judge, who was not only free, but more properly put, obliged, to reconsider each of her decisions on the motion for preliminary injunction.

By not making any argument in response to the LDF's showing that the usufructuary right is a property interest, instead conceding the issue, STA deprived the district court of the opportunity to fully explore the matter and waived this argument for appeal purposes. We consistently hold that arguments not made in the district court are waived. *Wigod*, 981 F.2d at 1519. This case presents no reason to deviate from that rule. A party responding to a motion for summary judgment is being put to its proof; if it chooses to concede the propriety of an earlier, nonbinding ruling in the case, it must live with the effect of its concession.

2. Were the Affidavits Deficient?

Affidavits used to support a motion for summary judgment must be made on personal knowledge and set forth facts that would be admissible as evidence at trial. Fed.R. Civ.P. 56(e). STA argues that the district court's findings in this case were based almost exclusively on affidavits unacceptable because riddled with conclusory statements and hearsay. Without the affidavits, STA argues, there is insufficient evidence to establish that harassment, racist or otherwise, ever impeded the LDF's ability to fish, or that racism motivated the harassment.

The problem with this argument is that STA did not object to the affidavits when responding to the motion for summary judgment. Because it was not presented to the district court, the argument is waived. *Wigod*, 981 F.2d at 1519. STA argues in its reply brief in this court that it objected to the affidavits at the hearing on the motion for a preliminary injunction.

As discussed above regarding the issue whether the treaty right to spear fish is "property," objecting at the preliminary injunction hearing but not in responding to the motion for summary judgment does not preserve the argument. Also, additional affidavits supported the motion for summary judgment that were not used as evidence for the preliminary injunction. Moreover, the "objection" STA's counsel made at the hearing was cursory:

> I have only read a few of these [affidavits], because we just got them, this last batch. We would make objection to the form of some of those affidavits as some of the averments are on information and belief, some are conclusionary, and I make a motion to strike those. But I don't know that that's necessary if you are going to take account of all that when you read it.

Tr. of hearing, March 7, 1991, pp. 6-7.

That was STA's only objection. STA did not seize its opportunity when responding to the motion for summary judgment to point out to the district court the objectionable portions of the affidavits, nor has it done so on appeal. While our job on summary judgment is to review the entire record *de novo*, we will not wade through every affidavit and make each of STA's objections for it. *Friedel v. City of Madison*, 832 F.2d 965, 969 (7th Cir. 1987). Neither do we expect the district court to sift through the affidavits and separate wheat from chaff. *Cf., In re Central Ice Cream Co.*, 836 F.2d 1068, 1074 (7th Cir. 1987) (district court not required to examine voluminous time records to "rescue the compensable time from the sea of non-compensable hours.").

Thus, we do not disagree at all with the district court's conclusion that the record contains ample undisputed facts demonstrating that the

> purpose of the on-water protests and the protests at the boat landings was to stop the plaintiffs' exercise of their right to engage in off-reservation spearing of walleye and muskellunge. The goal of Stop Treaty

> Abuse-Wisconsin has been to stop the plaintiffs from exercising their treaty recognized right to spear fish, by doing everything in its power to stop plaintiffs' spearing.

781 F. Supp. at 1390 (footnote omitted.) We also agree with the district court's conclusion that the record contains undisputed evidence that "Stop Treaty Abuse and its members exhibit racist . . . actions in their opposition to Indian spearing." 781 F. Supp. at 1394. Our disagreement with the district court, as explained below, is over whether the evidence of racist actions establishes beyond dispute a racist motivation for STA's harassment of the LDF spearers.

3. Does the Judgment Conflict With the First Amendment?

STA argues that the district judge committed an error of law in considering expression protected by the first amendment evidence of racial animus, echoing the district judge's own recognition when granting the preliminary injunction that "even vile, loathsome and hateful statements may be protected under the First Amendment." 759 F. Supp. at 1354. STA's argument on appeal is not well-developed, difficult to comprehend, and veers off on a different tack in the reply brief than in the opening brief.

In its opening brief, the gist of STA's argument seems to be that inflammatory speech, such as racial slurs, because protected by the first amendment, can never serve as evidence of racial animus. Taking STA's argument to its logical conclusion, the statement "I'm refusing to hire you because you are black and I think all blacks are inferior" would not be admissible evidence of discriminatory hiring. This is patent nonsense.

While the first amendment in fact does preserve the right to speak offensively, it does not provide a shield against the logical import of that speech. Using the allowed speech as evidence of a prohibited action does not

negate the right to so speak. Conduct may be prohibited, even if the conduct is evidenced or carried out by speech, without abridging the right of free speech. *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). It bears keeping in mind that even if the LDF does eventually prevail, injunctive relief will not prevent STA members from shouting racist invective at spearing sites, only from engaging in racially-motivated activity that interferes with the fishing.

Perhaps admitting the utter baselessness of this argument, STA asserts in its reply brief that the terms of the district court's injunction unlawfully restrict its first amendment right to engage in political protest, since it "is apparent that . . . any attempt to . . . demonstrate opposition, even if conducted in total silence, could be interpreted as [violating the injunction.]" We do not consider arguments omitted from an opening brief raised only in a reply brief. *Beraha v. Baxter Health Care Corp.*, 956 F.2d 1436, 1414 n.5 (7th Cir. 1992); *Reynolds v. East Dyer Development Co.*, 882 F.2d 1249, 1253 n.2 (7th Cir. 1989). Moreover, because we are reversing and remanding to the trial court for further proceedings, it is not certain the same permanent injunction, or any at all, will be entered.[9] We do not mean to suggest, however, that we agree at all that the terms of the injunction are flawed.

4. Do Disputed Issues of Material Fact Preclude Summary Judgment?

The main issue raised by this appeal, upon which we find it necessary to reverse, is whether the undisputed material facts establish as a matter of law that STA's harassment of the LDF spearers was motivated by the race of the spearers. STA and Crist contend that race was irrelevant; the sole motivation was a desire to "save

[9] For the same reason, it is not necessary to address STA's argument that the terms of the injunction violate Wisconsin state laws governing the use of navigable waters.

fish."[10] The district judge found that racist statements made by STA and its members, as well as the harassment in and of itself, established as a matter of law that STA was motivated by racism. We agree with the district court that the evidence of racism in this case is strong evidence of a racist motive: our disagreement is confined solely to whether STA produced evidence sufficient to place that motive in dispute. Our inquiry focuses on whether the district judge was entitled to disbelieve STA's evidence that it was not motivated by racism. Fundamentally, the issue is whether racist acts conclusively demonstrate racist motivation.

For the purposes of this discussion, there is no need to elaborate on our earlier description of the evidence of racism in the record; it is ample.[11] However, the record

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[10] This oversimplifies to avoid unnecessary discussion. Race is relevant to another aspect of STA's philosophy: by upholding treaties, the United States unfairly grants Indians "rights" not granted to other groups. While this tenet of STA's ideology reveals confusion over the difference between honoring contracts and creating rights, it also indicates a misguided notion of equality rather than racism against Indians.

[11] STA devotes much of its argument that its motivation was in dispute to attempts to show that various examples of racially-derogatory conduct were not what they seem. For example, it is undisputed that Al Soik, a director of STA, chanted "Tom, Tom, the white man's son" at protests. STA argues that this chant does not demonstrate racism because Soik, by affidavit, stated he believed it "not racist because not directed at Indians in general, only a specific individual." On summary judgment, Soik's affidavit must be believed: he did not think the chant was racist. But Soik's subjective belief does not answer the question.

Racism has both a subjective and objective measure. For example, an employer who discriminates against a non-Asian job applicant in favor of an Asian due to a belief that "Asians are better at math," commits a racist act no matter how strongly the employer subjectively believes Asians have superior math skills. Thus, we agree with the district court's findings of undisputed evidence of racism.

(Footnote continued on following page)

also contains evidence indicating that this racism may have been an undesired component of STA's protest activities, unrelated to the legitimate, non-discriminatory motives proffered by STA. In Crist's affidavit opposing summary judgment he denies racist motivation, or, for that matter, ever having uttered the racial slurs attributed to him in the affidavits of others. STA passed out "Protesting Policy" flyers at STA-encouraged protests that state in part:

> STA/WIS only supports *peaceful* protests. The following 5 points are not peaceful and are not acceptable behavior. Please do not engage in the following:
>
> **DO NOT . . .**
>
> 1. carry signs containing racial slogans.
> 2. shout racial or obscene remarks.

At one protest, Crist publicly condemned as racist a protestor's display of an Indian-head effigy impaled on a spear.

Nevertheless, the district judge found the evidence of racial motivation undisputed: "Despite their assertions to the contrary, Stop Treaty Abuse and its members exhibit racist motives and actions in their opposition to Indian spearing." 781 F. Supp. at 1394. The seeds of our difficulty lie here, in the district judge's casting aside of STA and Crist's "assertions to the contrary" regarding motivation. In essence, the district judge concluded either that the proffered non-discriminatory motives were pretextual, or at least insufficient to rebut the LDF's showing of racial motivation to the degree necessary to put motive in dispute. This conclusion departs from our oft-repeated observation that evidence of mixed motives is "ordinarily

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[11] *continued*

The issue, however, is not whether Crist and STA are racist. It is whether that racism was a motivating factor in the decision to harass LDF spearers. If the spearers were white, would STA and Crist have protested anyway, but seized upon some other attribute, such as hair length, to insult?

not grist for the summary judgment mill." *Adler*, 939 F.2d at 479.

Concluding that racism was a motivating factor necessarily means that the district judge disbelieved the affidavits filed by Crist and other STA officers denying racial motivation. Relying solely on affidavits to determine issues of motivation and intent is not a recommended course. *Dahnke v. Teamsters Local 695*, 906 F.2d 1192, 1196 (7th Cir. 1990). Our repeated references to this truism are often found in explanations why defendants' affidavits denying an improper motive do not usually entitle them to summary judgment. *See, e.g., Egger*, 669 F.2d at 502.

Such affidavits may be enough, however, to make motivation a disputed fact, requiring denial of a summary judgment against a defendant. Given that the party opposing a summary judgment motion is entitled only to every *reasonable*, as opposed to *conceivable*, inference, *Spreen v. Brey*, 961 F.2d 109, 111 (7th Cir. 1992), the question becomes whether any finder of fact, in the given circumstances, would believe the denial of racist motive. If so, the denial creates a genuine issue of fact requiring trial to ascertain the credibility of the affiants, discern the truth of the facts alleged in the affidavits and resolve the factual dispute. *Covalt v. Carey Canada, Inc.*, 950 F.2d 481, 485 (7th Cir. 1991); *Santiago v. Lane*, 894 F.2d 218, 223-24 (7th Cir. 1990).

In addition to affidavits of Crist and other STA officers denying a racial animus, other evidence in the record, such as the printed STA "Protesting Policy," lends an air of reasonableness to the denial. Thus, we disagree with the district judge that evidence of racist motivation is undisputed. In so doing, we admit the facts of this case make this an extremely close call, and require an answer to an obvious question: how can the many racist acts evident in the record not constitute undisputed evidence that racism motivated the harassment?

Our disagreement with the district judge's resolution of this question is disturbing because it is based in part

upon recognition of an ugly truth: we live in a society in which racism is pervasive and racial slurs are common. Casual attention to the daily news is a constant reminder. Minor traffic accidents escalate into racial incidents as tempers flare; the owner of a major league baseball team refers to her players as "million-dollar niggers" and justifies the remark by explaining that she was only joking.

The frequency and casualness with which racial slurs are used and the complexities of human behavior make it possible, we think, that racist conduct accompanying a particular behavior does not necessarily mean that the behavior was racially motivated. Consider a hypothetical member of a group committed to protesting against wearers of fur coats. This protestor also happens to be virulently racist against blacks. At a demonstration outside a fur salon, the protestor discovers that the salon's proprietor is black. It seems highly unlikely that the protestor would refrain from making racially derogatory remarks. Whether the remarks are due to a lack of self-control, are an attempt to make the protest even more unpleasant for the furrier, or are spoken because they increase the protestor's personal satisfaction, it is clear that racism was not a factor motivating the protest.

The present case is similar—albeit not identical, as STA knows the spearers will always be Indians—in that STA asserts that it is motivated by its desire to "save fish." This is not an absurd argument: the district judge admitted in ruling on the preliminary injunction that it has "some surface plausibility." 759 F. Supp. at 1349. Years of litigation by the state of Wisconsin in *Voigt* opposing the same treaty rights STA opposes also indicates that reasons other than racism may motivate STA. There is no dispute that unregulated spearing could detrimentally impact the fish population.

The district judge found STA's environmental concerns to be a pretext for discrimination, however, remarking:

> [I]t is disingenuous for defendants to argue that they are trying to prevent the Lac du Flambeau from spear-

> ing or gill netting only because they oppose those activities and not because they are biased against Indians in general. Defendants have not pointed to any other instance in which they have acted against a threatened harm to the fishing environment. It is impossible to escape the conclusion that it is the coalescence of a perceived harm *and* the minority source of that harm that produced the defendants' reaction.

781 F. Supp. at 1394.

We think this reasoning improperly shifts the burden of proof on summary judgment. It is not STA's burden to establish a track record of ecological protest. It instead is the LDF's burden to prove that STA's interference with spearing was improperly motivated. Viewing the evidence most favorably to STA, as we must when reviewing a grant of summary judgment, the fact that this is the first encroachment against fish that moved STA to protest may not be disbelieved because of no evidence of other protests.[12]

The second, and prime, reason why the district judge found the "save fish" argument to be a pretext for discrimination was based on her observation that racial discrimination is unlikely to occur until an individual seeks to exercise a right, e.g., the right of a black person to move into a neighborhood populated entirely by whites. In support of this reasoning, the district judge cited an analogous opinion by the Court of Appeals for the Second Circuit in *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990). *Terry* involved protests held at abortion clinics, alleged by plain-

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[12] On the other hand, if STA had offered evidence that it also never protested against other activities allowed exclusively in Wisconsin to Native Americans, such as on-reservation gambling, could an inference be drawn contrary to the district judge's inference of bias against Indians? While both inferences may be permissible, neither is required. On summary judgment, STA is entitled to the inference that LDF spearing was the first event perceived so harmful as to galvanize protest.

tiffs to be part of a conspiracy by defendants to deprive women of their constitutional rights thereby violating 42 U.S.C. § 1985(3).

The defendants in *Terry* argued they were motivated solely by opposition to abortion, but the court found that an animus against women in general could be presumed from the protests:

> It is sophistry for defendants to claim a lack of class-based animus because their actions are directed only against those members of a class who choose to exercise particular rights but not against class members whose actions do not offend them.

Id. at 1359. Citing this passage from *Terry* because of the obvious similarity between the "save fish" and "save unborn children" defenses, the district court found STA's fish-saving motivation insufficient to make motivation a disputed fact and defeat the LDF's motion for summary judgment.

While not repudiating the logic in all circumstances that animus against a group can be presumed from protest directed at that group, the Supreme Court's recent decision in *Bray v. Alexandria Women's Health Clinic*, 61 U.S.L.W. 4080 (U.S. Jan. 13, 1993) requires us to examine the application of the proposition to the present facts critically. *Bray*, like *Terry*, was an action under § 1985(3) where plaintiffs argued that an animus against women is demonstrated by protest against abortion. The Court rejected this reasoning:

> [R]espondents' contention that a class-based animus has been established can be true only if one of two suggested propositions is true: (1) that opposition to abortion can reasonably be presumed to reflect sex-based intent, or (2) that intent is irrelevant . . . . Neither proposition is supportable.
>
> As to the first: Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively

> or predominately by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews. But opposition to voluntary abortion cannot possibly be considered such an irrational surrogate for opposition to (or paternalism towards) women. Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of or condescension toward (or indeed any view at all concerning) women as a class.

Bray, 61 U.S.L.W. at 4082.

We do not mean to place Crist and STA on par with the anti-abortion protestors discussed in *Bray*. In the present case an element missing in *Bray* is present—the use of racial slurs, which are certainly evidence of the prohibited intent. We cite *Bray* only to make the point that the district judge too easily, and wrongly, in our view, dismissed STA's proffered motivation, saving fish, as a pretext for discrimination.

Opposition to spearing is not irrational. By necessity, the objects of that opposition will be Indians. That STA and its members have chosen to inject racism into the protest would allow a trier of fact to find that they are motivated by racism. However, the denial of that motivation by Crist and the other members of STA is not entirely unbelievable. The unfortunate frequency of racial slurs in our society, coupled with the plausibility of STA's proffered motivations, leaves motivation in dispute. The sincerity of the motivation proffered by Crist and his fellow STA members must be determined by a fact-finder at trial, not by the judge on summary judgment. *Covalt*, 950 F.2d at 485.

It is regrettable that Crist, STA and their supporters may view our decision today as a victory. We wish to dispel any such notion. As the record stands, the stench of racism is unmistakable. We refuse to fall victim to the maxim that "hard facts make bad law," however, and believe well-established principles governing the disposition

of motions for summary judgment require that STA and Crist be allowed a trial to demonstrate the sincerity of their assertions of an absence of racial motivation.

E. Attorneys' Fees

On July 17, 1992 the district court entered judgment awarding the LDF $182,745.92 for costs and fees pursuant to 42 U.S.C. § 1988, resulting in appeal No. 92-2672 which was consolidated with the prior appeal on the merits by order of this court dated November 4, 1992. Because we are reversing the judgment on the merits, we also vacate the judgment for fees and costs. *Pardo v. Hosier*, 946 F.2d 1278, 1285 (7th Cir. 1991).

For the foregoing reasons, we affirm the district court's decisions to deny STA's request for a jury trial, motions for disqualification and to amend its answer, and to grant the LDF's motion to strike STA's supplemental brief. We reverse the district court's order granting summary judgment and dismissing the LDF's remaining causes of action. We vacate both final judgments, reinstate the preliminary injunction and remand for further proceedings consistent with this opinion. Circuit Rule 36 shall not apply on remand.

AFFIRMED IN PART;
REVERSED IN PART;
VACATED AND REMANDED.

MANION, *Circuit Judge, concurring.* I join the court in its discussion and holding in parts I, II, and III.A, B, C and E. However, I concur in the reversal of the district court's summary judgment under part III.D. I write separately to express a somewhat different view of the evidence of racism in this case.

By their treaty with the United States (Treaty of September 30, 1854) the Chippewa Indians retained rights

outside the boundaries of the reservation, including the (unrestricted) right to fish certain waters in Wisconsin. See *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir. 1983). The defendants consider the Chippewas' methods of spearfishing an abuse of the terms under the treaty. Because only Indians can use spotlights to spear spawning game fish (methods otherwise prohibited by Wisconsin law), race inevitably pervades the conflict between the Indians who want their fishing rights and the Wisconsin residents who want those rights restricted.

Section 1982, enacted as part of the Civil Rights Act of 1871, guarantees to all citizens the same property rights as enjoyed by white citizens. The obvious assumption of section 1982 is that white citizens have certain property rights, and that those same rights might be denied to others on account of race. The irony in this case, however, is that the Indians have the exclusive fishing rights and non-Indian citizens wish to protest, making racial overtones inevitable. These facts distinguish this case from the employment or housing discrimination suits that we commonly encounter, where property rights may be obtained regardless of race.

On the surface, at least, this is a protest case. Because only Indians have the right to spear fish, it is not likely that the defendants could protest without dealing with the issue of race in some manner. Race obviously played a major part in the original treaty preserving Indian fishing rights. Necessarily it would play some part when members of the public demonstrate to take those rights away.

I am not comfortable with the court's discussion separating evidence of racist activity from racist motivation. While some may argue that "[w]e live in a society in which racism is pervasive and racial slurs are common," [*supra* p.23] it is just as likely that some of the protesters were as offended by the racial slurs as they were by the Indians' fishing methods. The actions taken by some probably expose their motivation. A district court cannot read a person's mind, so in order to determine motive, the

court must consider the person's actions. Slurs may result in the heat of an encounter that was motivated by a sincere objection to spearing fish. In that case the racial motive may be insignificant. On the other hand, if a person is drawn to the protest in order to use the opportunity to vent racial animus against Indians, he violates section 1982, regardless of his objections to the fishing methods.

I concur in the result because the defendants' affidavits are sufficient to place in dispute the issue of whether race played a motivating part in their actions. This "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights v. Metropolitan Housing Dev'l Corp.*, 429 U.S. 252, 266 (1977). At trial, the district court will need to determine whether the defendants meant to protest fishing rights, malign Indians, or both.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

LAC DU FLAMBEAU
BAND OF LAKE SUPERIOR CHIPPEWA INDIANS,
Michael Allen, Wa-Swa-
Gon Treaty Association, Thomas Maulson,
Robert Martin, Nick Hockings, and
Gilbert Chapman, Plaintiffs,

v.

STOP TREATY ABUSE-WISCONSIN, INC.,
and Dean Crist, Defendants.

No. 91-C-117-C.

United States District Court,
W.D. Wisconsin.

Feb. 7, 1994.

Members of Indian tribe sought permanent injunction to prohibit protesters from physically interfering with exercise of treaty protected fishing rights. The District Court granted injunction, 781 F.Supp. 1385, and protesters appealed. The Court of Appeals reversed and remanded, 991 F.2d 1249. On remand, the District Court, Crabb, Chief Judge, held that tribe proved that protesters' interference was racially motivated.

Injunction granted.

Brian L. Pierson, Irvin B. Charne, Hall, First & Patterson, S.C., Milwaukee, WI, for Lac du Flambeau Band, Michael Allen, Wa-Swa-Gon Treaty Ass'n, Thomas Maulson, Robert Martin, Nick Hockings, Gilbert Chapman.

Richard E. Sommer, Sommer, Olk & Schroder, Rhinelander, WI, for Stop Treaty Abuse-Wisconsin, Inc., Dean Crist.

Al Soik, pro se.

Elaine Soik, pro se.

Frederick E. Hatch, Sayner, WI, for Wayne Pieper, Glen Handrick, Howard Caputo, Jack Lanta, Rose Lanta, Lois Pavlovich, Patrick Long, David Worthen and Mike Ahlbom. Tommy Handrick, pro se.

Charles Ahlbom, pro se.

Steven Garbowicz, Drager, O'Brien, Anderson, Burgy & Garbowicz, Eagle River, WI, for Charles Gilman

Brian Crist, pro se.

Charles H. Bohl, Milwaukee, WI, for James Williquette, David Endblom and Wayne Wirsing.

OPINION and ORDER

CRABB, Chief Judge.

In this civil action, plaintiffs are seeking a permanent injunction restraining defendants from interfering with plaintiffs' exercise of their treaty-preserved rights to hunt, fish and gather in the area of northern Wisconsin ceded to the United States by the Lake Superior Chippewa Indians in 1837 and 1842. Plaintiffs allege violations of these rights under 42 U.S.C. §§ 1982, 1985(3) and 1986 and under state law. In an opinion entered on January 6, 1992, I granted plaintiffs' motion for permanent injunctive relief after finding that defendants had interfered with § 1982's guarantee that all citizens are to enjoy the same rights enjoyed by white citizens to "inherit, purchase, lease, sell, hold and convey real and personal property" when they interfered with plaintiffs' exercise of their right to spear fish by such acts as battering and assaulting the Indian spearers, causing wakes on the water that endangered the spearers, blocking the spearers' access to the waterfront, preventing the spearers from launching their spearing boats, impeding

the movement of spearing boats and shining lights into the eyes of the spearers. From the record, which was replete with examples of racial epithets and stereotyped characterizations of Indians, I was satisfied that plaintiffs had shown that defendants' acts were motivated by racial bias toward Indians and that their protestations to the contrary were insufficient as a matter of law to overcome the showing of racial bias. Accordingly, I granted plaintiffs' motion for summary judgment and entered a permanent injunction against defendants' interference with plaintiffs' exercise of their right to spear fish. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc, 781 F.Supp. 1385 (W.D.Wis. 1992). A separate judgment for fees and costs was entered on July 17, 1992 in favor of the Lac du Flambeau band as a prevailing party pursuant to 42 U.S.C. §1988. On appeal, the Court of Appeals for the Seventh Circuit reversed the grant of summary judgment, vacated the judgment for fees and costs, and remanded the case for trial, holding that the motivation for the interference with plaintiffs' spearfishing was a disputed issue of material fact that could not be resolved on summary judgment. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc., 991 F. 2d 1249 (7th Cir. 1993).

From the evidence adduced at the bench trial held in conformance with the court of appeals' directive, I find that defendants' interference with plaintiffs' spearfishing was racially motivated, that is, it would not have occurred but for the racial animus of defendants and their followers.

From the undisputed facts of record and from the evidence adduced at trial, I find the following facts.

FACTS

The Parties

Plaintiff Lac du Flambeau band is a band of the Lake Superior Chippewa, a federally-recognized tribe. In 1837 and 1842 the tribe entered into treaties with the United States ceding huge tracts of land in northern Wisconsin, Michigan and Minnesota to the government while reserving the right to hunt, fish and gather throughout the ceded territory. Plaintiff Michael Allen is president of the Lac du Flambeau band. Plaintiff Wa-Swa-Gon Treaty Association is an unincorporated association consisting of members of the Lac du Flambeau band and others. It supports the tribe's exercise of off-reservation treaty fishing rights. Plaintiffs Tom Maulson, Nick Hockings, Robert Martin and Gilbert Chapman are members of the band who reside on the Lac du Flambeau reservation and wish to engage in off-reservation treaty-protected fishing in the ceded territory without unlawful interference.

Defendant Stop Treaty Abuse-Wisconsin, Inc. is a for-profit corporation organized under the laws of the state of Wisconsin, with its principal place of business in Woodruff, Wisconsin. Its avowed purpose is to stop tribal members from exercising their off-reservation treaty rights including their rights to spear and net fish. Defendant Dean Crist is a member and co-founder of STA and its chief spokesperson.

Defendant Crist, a resident of Minocqua, Wisconsin, works as a consultant for Alexander's Pizza, Inc., a restaurant he founded. He was born in Blue Island, Illinois in 1948. He attended racially integrated schools when he was growing up and worked as a camp counselor in multi-racial summer camps for children during the 1960's. He has enjoyed sport fishing since he was a young child. In college, he took courses in fisheries management and intended to go

to graduate school to continue those studies but was unable to obtain financial assistance. He moved to Minocqua in 1972 and opened Alexander's Pizza, Inc. He has hired Indians as employees in his restaurant.

Defendant Crist moved to northern Wisconsin in large part because of the fishing opportunities there. In his opinion, spearing and netting have had a detrimental effect on the inland lakes' populations of game fish although he admits that it may be "a buried detriment because nobody knows all of the effects of the spearing as it is currently practiced." He has seen the bag limits for walleye and muskie for sports fishermen decrease since 1983 and believes that the economic health of the community is correlated directly to the quality of sport fishing in the region.

Spearing

Under the applicable treaties, the Lake Superior Chippewa have the right to catch fish by spearing and netting. State law prohibits all other persons from engaging in such activity on any inland lakes, except that non-Chippewas may net buffalo fish and carp on a few very large inland lakes and may engage in winter ice spearing of sturgeon on Lake Winnebago. Chippewa spearing and netting are carefully regulated and monitored by wardens from both the Wisconsin Department of Natural Resources and the Great Lakes Indian Fish and Wildlife Commission, an inter-tribal, interstate organization. For example, spearers are required to obtain a permit for spearing, which is good for only one night and can be obtained only on the day the spearing is to take place.

The majority of Chippewa spearing occurs in the early spring. It begins as soon as the ice thaws from the lakes and lasts as long as spawning is taking place: usually between one to two weeks on any particular lake for walleye and an additional one to two weeks thereafter for

muskellunge. To spear the fish, tribal spearers stand in small boats or canoes and use a long metal five-tine spear. Because spearing begins at twilight and continues on into the night, the spearer usually wears a large miner's type hat with a light attached to illuminate the shallow water below him. A spearer standing in a small boat in the dark in the early spring is vulnerable to falling into the icy water if the lake becomes rough or the boat is subjected to high wakes created by motorboats passing near the boat.

The spearers launch their boats from the boat landings at the lakes where they intend to spear. Boat landings are state or county-owned areas set aside for public boat launching. Some landings include vehicle parking areas, but many landings are too small for parking and consist of little more than a small open space among the trees.

Before spearing, it is common for the Chippewa to hold a traditional ceremony involving prayers and the placing of a tobacco or "asema" offering into the water.

Defendant Crist's and STA's Operation

STA was formed at the end of the spring spearing season in 1988. During the following winter, articles of incorporation were drawn up and board meetings were held. The first general meetings took place in the spring of 1989. At that time, a "couple hundred" persons had joined, each paying a ten dollar membership fee. At first the board intended to use the money to intervene in the ongoing litigation between the state of Wisconsin and the Chippewa. When that proved impossible, the board decided to organize protests at the landings. It was important to STA and to Crist to get as many people as possible to the landings. Defendant Crist believes that STA was responsible for bringing large crowds of protesters to the landings.

Persons who wanted to know where STA would be protesting on a given night could call defendant Crist's restaurant to be directed to a particular boat landing. Generally, defendant Crist would organize protests at the landings where he believed members of the plaintiff band planned to spear. His goal was to reduce the walleye harvest of the tribal members; to that end, he urged persons to come to the landings, to crowd the landing area and to protest the spearing. Also, he organized onwater flotillas of motorboats to crowd the launch area, making it difficult for spearers to launch their boats, and to create wakes near the spearing boats, interfering with the spearing and endangering the spearers while they were spearing. On some landings in 1989 and 1990, defendants Crist and STA attracted as many as 1,000 to 3,000 protesters. Many of the protesters, including Howie Caputo, a leader of STA, wore blaze orange hunting attire. From the 1990 season on, many also sported shirts, hats and buttons with STA insignia on them. Several of the protests became violent, particularly in 1989, when drinking was still permitted on the landings. The incidence of violence decreased in 1990 after alcoholic beverages were no longer permitted at the landings.

STA advised members who were going to be making wakes on the lakes to make sure they had lawful illumination and personal flotation devices. Defendant Crist warned STA members not to target a specific group but to emphasize the injury to the resources. In 1990, STA published and distributed a flyer entitled "Protesting Policy," in which it stated that it supported only peaceful protests and asked protesters not to carry signs containing racial slogans, not to shout racial or obscene remarks, not to throw rocks or other objects, not to engage in arguments with treaty supporters and not to engage in physical violence with treaty supporters.

STA sponsored a concrete walleye decoy contest, which was designed to encourage the planting of concrete walleye decoys in the spawning beds on which it was hoped that the spearers would break their spears. On many landings in 1990, protesters used whistles to blow directly into the ears of spearing supporters. STA sold whistles at the landings in 1990 and included them in the STA protest kits they sold at their rallies. The packets were called "resource rape" kits in reference to Crist's and other STA members' references to spearing as a rape of the resources.

Immediately following the filing of this lawsuit, the STA board authorized the destruction of all STA membership lists. At this time, STA has no minutes, no records of contributors to the organization, no record of the lakes and landings where it organized protests, no lists of persons who participated in the STA lake watch system, no records of individuals on whose behalf STA has paid legal fees or costs, and no list of lakes and landings where STA has protested and the dates of the protests.

Incidents at Landings and on Lakes

On the lakes where plaintiffs and other tribal members speared in 1989, 1990 and 1991, protesters used high-powered motorboats to create wakes and rock the boats in which spearers were standing, threw stones at the spearers who were trying to launch their boats from the landings, crowded the landings to try to prevent spearers from getting their boats to the water, encircled the launch areas with their motor boats to interfere with the spearers' efforts to launch their boats and move them away from the landings, taunted and threatened spearers and their supporters, yelled racial and sexual insults, shined lights in the eyes of spearers as they were spearing, and mocked the religious and cultural significance of spearing. Often, protesters threw rocks that struck spearers and caused injury. At one

lake, protesters used slingshots to hurl rocks at spearers. At another lake, a protester struck a spearer with a fishing lure he cast at the spearer. This interference and harassment took place despite the presence at the lakes of numerous law enforcement officers recruited from the entire state and mobilized into an emergency force for the spearing season and despite the establishment of fenced-off areas intended to separate protesters and supporters from the boat launching areas.

At landings where plaintiffs speared in 1989 and 1990, protesters yelled such comments as, "All you Indians that are on welfare" or "All you Indians that are filling up our jails" and asked Indian women at the landings, "What do you use that spawn for, to douche?" Indians with long hair were called "Tonto" or "redskin." Protesters asked spearers where they got their boats and trailers and made statements to the effect that taxpayers had paid for the boats. At Arbor Vitae Lake, protesters sang a variation of the song, "Tom Dooley," to plaintiff Tom Maulson as he tried to spear: "Hang down your head, Tom Maulson, hang down your head and die." At many landings, STA board member Al Soik and his wife Elaine Soik beat on drums to the chant of "Hey, how are ya? Hey, how are ya?" in mockery of an Indian chant. On several occasions, Elaine Soik wrapped a bandanna around her head, stuck a twig in her hair as a feather, and caricatured an Indian ceremonial dance. On Minocqua Lake, STA leader Jack Lanta stated, "Niggers are better than Indians." At Big Arbor Vita, Jack Lanta said, "Those Indians are all on welfare that are out there spearing." At one landing, protesters commented in reference to some young Indian men who had brought drums to the landing, "The hardest work they've ever done in their life is pounding on that drum."

On one occasion on Trout Lake, STA leader Howie Caputo yelled, "Go home, timber niggers" to plaintiff Maulson while circling Maulson's spearing boat in his own motorboat. Other STA members made comments to the effect that Indians couldn't find their food stamps because they kept them under their work boots. Members of STA, including board member Tommy Handrick, frequently called spearers "welfare warriors," "wagon burners" and "timber niggers." At Squirrel, Willow Springs and Namekagon lakes, protesters yelled, "Timber nigger" and "You're a defeated people; you are a conquered people. At Sand and Dam Lake, protesters chanted, "Spear an Indian, save a walleye. Drown 'em, drown 'em." Especially during the 1990 spearing season, it was customary to reserve the derogatory chants until after 10:30 p.m., by which time most of the press and camera crews had left the landings.

Protesters yelled, "Dead Indian, dead Indian" and sang, "A half breed here; a half breed there," to the tune of "Old McDonald had a farm." At Eau Pleine Reservoir, they referred to Indian women as squaws and bitches and said, "The only good Indian is a dead Indian." In 1989, they said that "Custer had the right idea" and "Tom Maulson is nothing but a fucking Jew. We need another Hitler to take care of him."

At numerous landings, protesters came up to spearing supporter Anita Koser and talked about stabbing her in the back. Protesters made such statements as "Wait until the lights go out. Then we're going to have some fun"; "If those law enforcement officers weren't there, we'd really have some fun" and "You're not going to go home tonight except in a body bag." Protesters told plaintiff Hockings, "You're not going to get home tonight. You're not going to get off the boat landing. You're not going to get off the water. I'll shoot you in the back of the head."

Spearers were the subject of threats of death and violence to themselves and their families even when they were not at the landings or out on the water. They heard the threats on the street in town, in the media and on the road on the way to the landings. For example, protesters carried signs at the landings that read, "Spear an Indian, save a walleye" and "Spear a pregnant squaw, save two walleyes." Some wore hats or shirts that showed a frontal view of a gun barrel and said, "Spear this." At Eau Pleine Reservoir, a protester carried a mannequin's head made to mimic the head of an Indian mounted on a spear. STA board member Dave Worthen displayed a poster in his tavern that read, "Wanted: Small Indians for mudflaps. Must be flexible and willing to travel."

In 1991, protesters appeared at landings carrying the Plains Indian flag with a black circle and a slash painted across the face of the Indian. The Plains Indian flag is an American flag that has a picture of the face of a Plains Indian in place of the stars. The Indians view the stars of the American flag as celebrating places in which Indians died and find them offensive for that reason; the Plains Indian flag signifies to them their pride in being both American and Indian. At Sand and Dam Lake in 1991, STA members lighted a Plains Indian flag and burned it.

At Star Lake, one protester suggested opening the car doors and letting the dogs out to attack spearers and their supporters. Another responded, "No. Remember they are just Injuns. They eat dogs," and the first protester laughed.

At many lakes, protesters threw stones at spearers who were in the water. At some lakes, protesters threw stones at the families and supporters of spearers who were on the landings. At Trout Lake, a small group of spearers trying to launch boats was rushed at by protesters. When the police subdued the surging protesters, other protesters

threw rocks at the spearers. At North Twin Lake, protesters followed the spearers into the water, throwing rocks at them as they launched their boats. When the spearers returned from fishing at the end of the night, they were greeted with more rocks. Plaintiff Nick Hockings was hit in the back with a rock; another spearer was hit in the knee. Other protesters waded into the water, telling those "fucking" Indians to go home or they wouldn't get home. On Big Arbor Vitae Lake, plaintiff Maulson's son was hit in the back by a stone thrown from the landing. At Butternut Lake, tribal spearer Robert Chapman was hit by a shot from a pellet gun.

Incidents Involving Defendant Crist

At Big Arbor Vitae Lake, defendant Crist and other boaters, whom he called the "STA navy," tried to create wakes on the lake to keep the spearers from spearing. Another time at Big Arbor Vitae Lake, he and the others surrounded another spearer, Scott Smith, and told him he wasn't going to leave the lake that night. On one occasion at Plum Lake, defendant Crist used his bullhorn to lead the crowd in various chants and to ridicule plaintiff Hockings with insults about his being "a traditional Indian in a traditional aluminum boat made from a traditional aluminum tree." Later that evening, defendant Crist and other protesters brought their boats within about twenty feet of a spearing boat and mocked the traditional tobacco ceremony in which plaintiff Hockings and his wife were engaging at the time. As Hockings's boat moved away from the landing vicinity, approximately fourteen motor boats began creating high wakes that caused the spearing boat to rock, throwing plaintiff Hockings's wife out of her seat and injuring her back. To evade the motor boats, the spearers tried to go in closer to shore, but were met there by a group throwing stones.

On Star Lake, defendant Crist created wakes that caused spearer Brooks St. John to fall down in his boat and injure his back. On Squirrel Lake, Crist and others made wakes in an effort to stop spearer Scott Smith from spearing. At one time during the evening, they came within about twenty feet of Smith's boat, traveling at full speed.

On numerous landings during the spearing season in 1989 and 1990, defendant Crist told the crowds of protesters, "You're doing a good job. Keep up the good work. Don't quit; we're winning." He often used the term "squaws" in a derogatory reference to Indian women and made comments about fat, ugly, lazy Indians, Indians on welfare and Indians being unable to hold down jobs. In 1990 at Big Arbor Vitae Lake, Crist pointed to two Indian girls nearby and said, "Look at those fat Indians. Eating all the commodities up at Flambeau there." On another occasion at Arbor Vitae lake, defendant Crist said of plaintiff Maulson and other spearers, "Here come the welfare warriors; here come the walleye wimps."

At Lake Nakomis in 1990, defendant Crist came up behind Anita Koser and said to his companion, "Don't start that ceremonial sweat hog's ceremonial jacket on fire or we'll have a ceremonial scrap heap burning." Koser understood this to be a threat of physical harm. On another occasion, Crist told Koser that "You didn't get fat from eating walleye. You got fat from spending your welfare check at the bar."

Protesters saw defendant Crist as their leader. They sang a song to the effect that they would follow defendant Crist wherever he went. It was common for defendant Crist to pull up near a landing in his boat and address the crowd, using his megaphone, with comments such as "Are we having fun yet?" to which the crowd would respond with cheers. Defendant Crist would use his megaphone and yell, "STA"

and the crowd would yell back, "STA." Another cheer he used was "What do you get for raping the resource? Indian AIDS."

At Sand and Dam Lake in 1991, while defendant Crist was speaking on his bullhorn, protesters surrounded one of the spearing supporters and her young children. When an African-American man tried to help her out, the crowd called him "nigger," "fried chicken," "watermelon seed-sticky nigger," and "Aunt Jemima" and suggested he go back to Africa. Others in the crowd yelled that "the timber niggers were getting a real nigger." Meanwhile, defendant Crist continued to encourage the crowd, using his bullhorn. Near the end of the same evening, Crist told the crowd, "It was a good evening; go home and rest up; we'll do this again."

Defendant Crist never used racial epithets in the presence of reporters. On two occasions, he quieted down a crowd of protesters at the request of law enforcement officers. One was at North Twin Lake in 1989, when an officer asked Crist to ask the crowd to settle down and let the spearers off the water. The second was an incident at Star Lake involving a group of people who had climbed onto the roof of a large public restroom and had begun fighting. At the request of the local sheriff, defendant Crist talked the group into getting off the roof. On another occasion he asked the protester bearing the spear embellished with a mock head of an Indian to leave the area.

At an STA meeting at the Arbor Vitae town hall in 1989, defendant Crist described STA's goal as stopping spearing and the exercise of other off-reservation treaty rights. His plan was to stop all spearing in one county each weekend. Initially, the focus was to be on Vilas County and the idea was to engage in peaceful sit-ins, with STA paying any fines incurred by STA members who were arrested. Crist

told the audience to treat the police nicely and asked that they not throw rocks from slingshots at officers and wardens. Someone in the audience asked "What about spearers?" "there was a pause and then Crist and the audience laughed. Later, Crist said, "I don't mean to throw bottle rockets and stones at spearers, but it's okay to feel animosity toward them." He added that spearers are blackmailing you and I."

At an STA meeting at the Sugar Camp town hall in 1989, a member of the audience told Crist that wrist rockets were unavailable; they'd been sold out everywhere. Crist chuckled and said, "If you're going to use one, make sure you get an Indian." Later, he said that STA did not advocate violence and that if people used wrist rockets they might be arrested. At the same meeting, he suggested that protesters come down to the landings with their boats and vehicles to clog the landings and keep the spearers from getting out in their boats and he promoted the making of wakes to interfere with spearing.

Defendant Crist helped write and distribute a STA-sponsored pamphlet to STA members and the public that contained the following statements:

a. Chippewa spearers use spears "mass produced in China and Korea," and outboard motors "manufactured in Japan";

b. Many speared fish are sold;

c. "Thousands of fish spoil because of warm weather and the lack of ambition to clean them. Each year thousands of spoiled game fish are dumped in dumps and along road sides because tribal member [sic] didn't want to clean them";

d. Tribal members receive "huge amounts of free government surplus food including cheese, butter, milk and other vast amounts of commodity foods. Along

with these free foods they receive free food stamps and a cost of living allowance of over $20,000/household/year. They are also eligible for free government housing, subsidized heat and light, a whole list of government entitlements and subsidies, and a host of other government benefits. Tribal members receive 100% free medical and dental care, free pharmaceutical coverage, free day care and free and complete educational subsidies."

e. "Tribal members are allowed to shoot eagles. These eagles are shot solely for financial gain. . .. Whereas the U.S. Fish and Wildlife Service has spent millions to protect endangered species, any tribal member is above laws which are designed solely for the preservation of endangered species. In Florida, a tribal member intentionally shot an Everglades panther, the rarest large wild cat in North America. He was released and unpunished because he was a tribal member and not subject to Federal Game Conservation laws."

Defendant Crist appeared on a radio talk show in Milwaukee with plaintiffs Maulson and Hockings and Sarah Backus, a member of the Midwest Treaty Rights Network. During the show he repeated the kinds of statements contained in the STA-sponsored pamphlet, including those to the effect that all Indians are on welfare and that the Chippewa waste the fish they spear.

The statements in the pamphlet are inaccurate. Indians are not entitled to surplus food or to food stamps simply by virtue of being Indian. They receive surplus food or food stamps only if they qualify for them under the same program requirements that are imposed upon all applicants for state or federal benefits. Indians are eligible for subsidized housing on the same basis as any other citizen; they do not receive a cost of living allowance of over $20,000 a household; and they do not receive free and complete educational

subsidies. Like all other citizens, Indians are eligible for educational grants if their income is below a certain level. Indians are not allowed to shoot eagles or other endangered species. Had defendant Crist wanted to check the accuracy of the statements in the STA-sponsored pamphlet, he could have done so by telephoning or visiting the tribal operations office or by talking to tribal chairmen.

OPINION

All citizens of the United States are guaranteed "the same right . . . as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property" under 42 U.S.C. § 1982. To prove a violation of this statute, it is necessary to prove both that property rights were interfered with and that the interference was motivated by racial prejudice. Lac du Flambeau Band, 991 F.2d at 1257 (citing Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 616, 107 S.Ct. 2019, 2021, 95 L.Ed.2d 594 (1987)). The court of appeals has upheld the findings in the January 6, 1992 order that the right of the plaintiff tribe to exercise its usufructuary rights in the ceded territory is a property right, Lac du Flambeau, 991 F.2d at 1258-59, and that defendants interfered with plaintiffs' property right when they and others acting in concert with them or at their direction created wakes on waterways to interfere with spearing, planted concrete decoys, shined lights in the eyes of spearers, impeded the progress of boats, blocked spearing boats from moving from the boat landings out to the spawning beds and assaulted and battered members of the plaintiff band, their families and supporters. The only questions remaining to be decided on remand are whether racial prejudice was a motivating factor in the interference and, if it was, whether the interference would not have occurred but for the prejudice. Lac du Flambeau, 991 F.2d

at 1257 (citing Bachman v. St. Monica's Congregation, 902 F.2d 1259, 1262-63 (7th Cir. 1990)).

Plaintiffs bear the burden of persuasion on the first question, showing that race was a motivating factor behind the spearfishing protests; if they succeed, defendants bear the burden of showing that the interference would have occurred in the absence of racial prejudice. Price Waterhouse v. Hopkins, 490 U.S. 228, 242-46, 109 S.Ct. 1775, 1786-88, 104 L.Ed.2d 268 (1989) (plaintiff must persuade the factfinder that discrimination played a part in the adverse decision, and then, to prevail, defendant must persuade the factfinder that, even if defendant had not taken the impermissible factor into account, it would have come to the same decision); see Bachman, 902 F.2d at 1262-63 ("To be actionable [under §1982], racial prejudice must be a but-for cause, or in other words, a necessary condition, of the refusal to transact.") (citing Price Waterhouse, 490 U.S. 228, 109 S.Ct. 1775).

This inquiry is complicated somewhat by the fact that only Indians can spear fish, so that as a consequence, any protest against spearfishing is also directed against Indians. As the court of appeals noted, the United States Supreme Court confronted an analogous circumstance involving abortion protests in Bray v. Alexandria Women's Health Clinic, ___ U.S ___ 113 S.Ct. 753, 122 L.Ed.2d 34 (1993). The Supreme Court determined that abortion protests were not motivated by animus against women despite the fact that only women can have abortions. In remanding this case for trial, the court of appeals noted, "While not repudiating the logic in all circumstances that animus against a group can be presumed from protest directed at that group, the Supreme Court's recent decision in Bray . . . requires us to examine the application to the present facts critically." Lac du Flambeau, 991 F.2d at 1263. The court

also observed that in this case, "an element missing in Bray is present—the use of racial slurs, which are certainly evidence of the prohibited intent." Id.

Even when examined critically, the use of racial slurs in this case is so prevalent as to provide overwhelming evidence of "the prohibited intent." This is not a case in which plaintiffs grasp at a few stray statements made over a three or four year period in an attempt to suggest a biased state of mind on the part of the speakers. Plaintiffs have adduced evidence of countless episodes in which defendant Crist or persons acting at his direction or with his knowledge and approval hurled racial epithets at the individual plaintiffs, other tribal members, their families and supporters and taunted them with signs bearing racially offensive messages. Plaintiffs have established that defendant Crist produced and disseminated a brochure depicting the Chippewa as lazy and wasteful and the recipients of extravagant governmental benefits; that an STA board member displayed a sign in his tavern that read, "Help Wanted: Small Indians for use as mudflaps. Must be flexible and willing to travel"; and that STA members and others acting in concert with them ridiculed plaintiffs' religious and cultural customs and labeled the practices hypocritical. This is strong evidence of a racial bias on the part of defendants that cannot be dismissed as a coincidence resulting from the fact that only Indians spear fish.

Defendants argue that the court of appeals indicated that statements made at the landings cannot be used to show that defendants' harassment of plaintiffs was racially motivated. It is true that the court of appeals said that "racist conduct accompanying a particular behavior does not necessarily mean that the behavior was racially motivated." Lac du Flambeau, 991 F. 2d at 1262. The key word is "necessarily." The court noted the possibility that racially derogatory

remarks may be a consequence and not the cause of a protest, but it did not hold that such remarks can never be evidence of racial motivation or that they may not be considered as evidence in this case. The court did not deny that the indications of racist motivation in this case were strong; to the contrary, it noted that "the use of racial slurs . . . [is] certainly evidence of the prohibited intent," id. at 1263, and that "the stench of racism is unmistakable," id. at 1263-64. The court remanded the case for trial to determine whether defendants' "racist acts conclusively demonstrate racist motivation." Id. at 1260 (emphasis added).

Throughout the trial, defendants tried to show that plaintiffs and their witnesses were unable to identify specific STA members who made racial taunts. Plaintiffs did not need to identify all of the speakers. The statements of the protesters are attributable to defendants. Defendant Crist and the STA board members orchestrated the protests. They held organizational meetings, publicized the lakes that were likely to be speared, encouraged the protesters to go out to the landings, and when the crowds showed up, used spokesperson Crist to direct the protests. When he wanted the crowd to quiet down, Crist used his bullhorn to make it do so; when he wanted more "enthusiasm" or more intimidation, he achieved that as well. To say that the crowd's remarks are not attributable to defendant Crist defies common sense. For all intents and purposes they are his remarks.

Moreover, Crist's admission that the STA board ordered the destruction of the STA membership lists upon the filing of this lawsuit entitles the court to presume that the destroyed lists were unfavorable to defendants. Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119, 1134 (7th Cir. 1987), cert. denied sub nom. CBS Inc. v. Brown & Williamson Tobacco Corp., 485 U.S. 993, 108 S.Ct. 1302, 99

L.Ed.2d 512 (1988). In light of the document destruction, it is fair to presume that all of the persons who uttered racial slurs or engaged in violent acts were members of STA.

Although at trial defendant Crist attempted to distance himself from the acts and statements of persons on the landings, he did not succeed in doing so. The fact is that he was present on the landings or on the water when many of the racially-biased statements were made. Not only did he fail to take any effective action to stop the taunts, he repeatedly exhorted the crowds to "keep up the good work." It is true that on two occasions he quieted down potentially dangerous situations at the request of law enforcement officers and that on another occasion he asked a protester to leave. It is also true that in 1990 STA passed out flyers encouraging protesters not to carry signs containing racial slogans and not to shout racial or obscene remarks. However, these isolated actions are dwarfed by Crist's activities on the landings and on the water as well as by his tacit approval and active encouragement of the racial invectives that were voiced and the acts of intimidation that were committed in his presence. In the eyes of the protesters, law enforcement officers and spearers, defendant Crist was the leader of the protests. He was the one with the megaphone. He was the one who played peacekeeper while the TV cameras were present and reviled the Chippewa when the cameras were absent. When he told his supporters not to make racial remarks and not to throw stones at the Indians, they understood him to intend the advice only as a public relations ploy. They knew he was not criticizing them for their racist attitudes. This is why they laughed at the meeting in Arbor Vitae when he made a point of warning STA members not to use slingshots against law enforcement officers but omitted any similar warning about not using the slingshots against Indians.

Defendant Crist's goal was to increase the number of people at the landings to intimidate and harass the spearers. A most effective way to get people out on the landings was to appeal to their prejudices. The racism displayed at the landings was no "undesired component of STA's protest activities, unrelated to the legitimate, non-discriminatory motives proffered by STA," Lac du Flambeau, 991 F. 2d at 1261, but the expression of a deep vein of feeling that defendant Crist deliberately tapped into in concert with STA and exploited to bolster the protest activities.

In its opinion remanding this case, the court of appeals noted that there may be circumstances in which racist remarks are an unfortunate outgrowth of a protest rather than an indication of the purpose behind the protest. Lac du Flambeau, 991 F.2d at 1262. If, for example, a striking union member were to call the president of the company a racially offensive name in the heat of the strike, the name-calling would not necessarily mean that the strike was racially motivated. That is not the circumstance in this case. Defendant Crist employed racial stereotypes from the beginning, in an obvious attempt to exploit the deep-seated racism that existed in northern Wisconsin for his own purposes. See Price Waterhouse, 490 U.S. at 294, 109 S.Ct. at 1813 (noting that evidence of use of "stereotypes is, of course, quite relevant to the question of discriminatory intent"). By portraying the Indians as undeserving of the rights that they had preserved by treaty, he could justify the efforts to prevent tribal members from exercising those rights. Both in the STA brochure and in his radio appearance in Milwaukee, Crist emphasized the unworthiness of the Indians, perpetuating the idea that they were lazy and wasteful and lacking in respect for conserving nature. He had no compunction about ridiculing the cultural aspects of Indian spearing or the spearers' attempts to engage in religious ceremonies before spearing. "Perpetuating and en-

couraging stereotypes of persons as lazy or wasteful and ridiculing their religious and cultural practices are classic forms of racism that enable the perpetrators not only to rationalize the oppression of such people but to reinforce identification with the dominant group." Lac du Flambeau Band, 781 F.Supp. at 1394 (citing Kimberle Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv.L.Rev. 1331 (1988)).

By giving the public reasons for believing that the Indians were "bad people" who were unworthy to exercise special fishing opportunities and by condoning the use of racial epithets, assaults and the ridicule of Indian culture and religion at the landings, defendant Crist made it clear that he and STA encouraged and supported such prejudice. In no way can it be said that the consequent use of racially offensive statements, chants and signs was an "unintended" by-product of the protests. I conclude that plaintiffs met their burden of showing that defendants' protest activities were motivated by racial animus, and I turn to the question whether defendants established that they would have protested even if they had held no racial bias against plaintiffs.

Defendant Crist's evidence centered on his concern for the fish resource in northern Wisconsin and his friendships with Indian persons over the years. In connection with the latter, it is telling that not one Indian was called to testify regarding defendant's asserted lack of racial animus. Several people testified that they had observed defendant treating Indians well before the protests began, but none of these witnesses were Indian themselves. This testimony was of little significance. It is one thing to treat a group well when its members present no economic or personal inconvenience; it is quite another to continue to treat them that way when they have asserted interests in competition with one's own.

From defendant Crist's testimony and from other evidence in the record, it is clear that defendant Crist is concerned about the effect of Chippewa spearing and netting upon the fish resource in northern Wisconsin. His concern is not a wholly altruistic one: it stems from his enjoyment of fishing and his resentment of any infringement on his opportunity to enjoy the sport. The question, however, is not whether his and STA's concern for the fisheries and for hook-and-line fishing is selfless but whether defendants have proved that it is so compelling that defendants would have engaged in the extended protests on the lakes and landings in the long cold nights of a northern Wisconsin spring had it not been for the racial animus they and their supporters felt toward the Indians who were threatening their sport. I conclude that they did not. Although defendants would have been angry at anyone who restricted their fishing (including the Wisconsin Department of Natural Resources), it was a particular source of irritation that the threat came from persons they despised, whom they saw as fat, lazy, living on welfare at taxpayer expense and lacking appreciation for the wildlife resources of northern Wisconsin. The animosity for Indians as a group is what provided the fuel that kept protesters warm at the landings at ice-out time. Defendant Crist knew this and he employed it to his own ends deliberately. CE Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir. 1974), cert. denied, 419 U.S. 1070, 95 S.Ct. 657, 42 L.Ed.2d 666 (1974) (although defendant was motivated solely by profit, defendant violated §1982 when it exploited opportunities created by racism to sell homes to blacks at excessive prices).

Defendants made almost no attempt at trial to refute the evidence of racial animus on the part of STA or to demonstrate that STA members would have interfered with the spearing in the absence of racial animus. Not a single STA member besides defendant Crist testified in refutation of

plaintiffs' accounts of the protests. Defendants adduced no specific evidence except to show that STA buttons and hats were not sold until 1990 and that blaze orange was the color worn by another protest group, not STA. In contrast, plaintiffs adduced evidence of strong racial animus on the part of STA board members Al Soik, Tommy Handrick and Dave Worthen and other leaders of STA such as Jack Lanta, Elaine Soik, and Howie Caputo, as well as defendant Crist, who variously employed demeaning chants and slogans and displayed the demeaning mudflap poster.

Plaintiffs proved that defendants' protest activities were motivated by racial animus; defendants failed to prove that the protest activities would have occurred in the absence of such animus. Accordingly, I will grant plaintiffs' request for a permanent injunction. As I have emphasized in past orders, the injunctive relief that will be ordered is not intended to reach defendants' verbal expression of their views. It is intended only to enjoin defendants from physical interference with plaintiffs' exercise of their treaty-protected fishing rights.

ORDER

IT IS ORDERED that defendants Stop Treaty Abuse-Wisconsin, Inc. and Dean Crist and all those acting in concert with or at the direction of these defendants are enjoined permanently from

a) Assaulting or battering any member of the Lac du Flambeau band or any member of the family of a Lac du Flambeau band member at any landing or on any lake within the ceded territory;

b) Intentionally creating wakes on any waterway to interfere with any spearer;

c) Planting decoys in any waterway;

d) Intentionally blocking spearing boats from moving from the boat landings out to the spawning beds;

e) Shining lights into the eyes of any spearer or spearing boat operator while on the water;

f) Playing "leapfrog" with any spearing boat, or otherwise impeding the progress of any spearing boat; and

g) Taking any other action that is intended to or may reasonably be expected to interfere with plaintiffs' exercise of their spearing rights.

IT IS FURTHER ORDERED that the order for costs and fees entered herein on July 17, 1992 is reinstated and plaintiffs are entitled to an award of attorney's fees, pursuant to §2 U.S.C. 1988, for the work performed since July 17, 1992. No later than February 18, 1994, plaintiffs are to submit a supplemental pleading, setting forth with specificity the fees and costs incurred since the entry of the July 17, 1992 order. Defendants may have until March 4, 1994 in which to file and serve their objections to the fees and costs set out in the supplemental pleading.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 94-1469 and 94-2066

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, MICHAEL ALLEN, WA-SWA-GON TREATY ASSOCIATION, *et al.*,

Plaintiffs-Appellees,

v.

STOP TREATY ABUSE-WISCONSIN, INCORPORATED and DEAN CRIST,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 91 C 117—**Barbara B. Crabb**, *Chief Judge.*

ARGUED OCTOBER 7, 1994—DECIDED DECEMBER 8, 1994

Before CUMMINGS, FLAUM and RIPPLE, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In July 1991 plaintiff Lac Du Flambeau Band of Lake Superior Chippewa Indians ("LDF"); Michael Allen, the Tribe's chairman; the Wa-Swa-Gon Treaty Association;[1] and four members of the

[1] The Wa-Swa-Gon Treaty Association is an unincorporated association of members of the LDF and others supporting the exercise of off-reservation treaty-recognized fishing rights.

LDF filed an amended complaint seeking redress for breach of their rights as native citizens to be free from violence and threats of violence while exercising their right to fish. The defendants were Stop Treaty Abuse-Wisconsin, Inc. ("STA"), a Wisconsin corporation with its principal place of business in Woodruff, Wisconsin; 16 agents of STA residing in Wisconsin; and three county sheriffs. The gravamen of the amended complaint was that by engaging in racially motivated activities violating the plaintiffs' spearfishing rights in Wisconsin lakes under federal treaties, defendants contravened 42 U.S.C. § 1982. This section provides that:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Among other things, defendants are alleged to have assaulted, battered and shouted racial slurs at plaintiffs, their families and friends; rammed and attempted to swamp spearers' canoes; threatened spearers with violence; clogged boat landings; blocked lake access roads; surrounded plaintiffs at landings to prevent them from moving freely; and breached police barriers to prevent LDF members from exercising their spearfishing rights. The defendant sheriffs allegedly forced spearers and families and friends of spearers to stand with anti-treaty protesters, knowing that they would be verbally and physically harassed by protesters.[2]

On March 15, 1991, the district court granted plaintiffs a preliminary injunction and on January 6, 1992, granted them summary judgment and permanent injunctive relief on the LDF's § 1982 claim. Because full relief was available under § 1982, the district court dismissed plaintiffs' other claims. The final judgment permanently en-

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[2] The history of this litigation appears in 759 F. Supp. 1339 (W.D. Wis. 1991), 781 F. Supp. 1385 (W.D. Wis. 1992), 843 F. Supp. 1284 (W.D. Wis. 1994), and in 991 F.2d 1249 (7th Cir. 1993).

joined STA from interfering with the LDF's exercise of fishing rights. On July 17, 1992, the district judge entered a judgment for fees and costs in favor of LDF under 42 U.S.C. § 1988.

In 1993 we reversed the district court's award of summary judgment. While admitting that on the facts of this case it was "an extremely close call," *Lac Du Flambeau*, 991 F.2d at 1261, and that the "stench of racism was unmistakable" from the record, *id.* at 1263-1264, this Court held that the issue of racial motivation was not appropriate for summary judgment. We remanded the case to the district court for a bench trial to allow defendants an opportunity "to demonstrate the sincerity of their assertions of an absence of racial motivation." *Id.* at 1264.

From the evidence adduced at the bench trial held on remand, the district judge found "that defendants' interference with plaintiffs' spearfishing was racially motivated, that is, it would not have occurred but for the racial animus of defendants and their followers." *Lac Du Flambeau*, 843 F. Supp. at 1286. Defendants challenge this finding, but we conclude that the evidence of racial animus presented on remand readily supported the district court's judgment and therefore affirm.

Evidence of racial motivation

In her opinion on remand from this Court, Judge Crabb has marshalled six pages of evidence to show that defendants' interference with plaintiffs' spearfishing was racially motivated. *Lac Du Flambeau*, 843 F. Supp. at 1286-1291. There is no need to restate all the evidence in the opinion below supporting the district judge's conclusion. As shown there, STA's purpose was to stop tribal members from exercising their off-reservation treaty rights including their rights to spear and net fish. STA's cofounder and chief spokesperson, defendant Dean Crist, was opposed to LDF's spearing and netting of fish even though applicable treaties gave the Lake Superior Chippewas such rights.

A brief summary of the most egregious examples of defendants' conduct amply demonstrates the basis for Judge Crabb's findings. Spearfishing protesters yelled numerous racial insults at the Indians—among them the accusation that all Indians are on welfare and filling up Wisconsin's jails. STA members called spearers "Tonto," "redskin," "welfare warriors" and "timber niggers" and stated that taxpayers had paid for their boats; protesters also mocked an Indian chant and caricatured an Indian ceremonial dance. STA members were heard to say that Indians could not find their food stamps because they kept them under their work boots.

In addition to ridiculing Indian culture and traditions, protesters' racist rhetoric took more violent forms as well. The protesters advocated spearing an Indian to save a walleye and urged supporters to drown Indians. As the district judge reported at one point in her opinion:

> Protesters yelled, "Dead Indian, dead Indian" and sang, "A half breed here; a half breed there," to the tune of "Old McDonald had a farm." At Eau Pleine Reservoir, they referred to Indian women as squaws and bitches and said, "The only good Indian is a dead Indian." In 1989, they said that "Custer had the right idea."

843 F. Supp. at 1289.

Defendants employed these racial slurs to exploit the deep-seated anti-Indian racism in northern Wisconsin. 843 F. Supp. at 1294. Defendant Crist claimed that he lacked any racial animus and but for his protest activities had a good relationship with Indians in the community, but called no Indian to testify in support of this claim.

Analysis

The district court's finding that defendants acted with a racial motivation cannot be set aside "unless clearly erroneous." *Halas v. Consumer Servs., Inc.*, 16 F.3d 161, 164 (7th Cir. 1994). That finding was supported by abundant evidence and was not clearly erroneous. We adhere

to the view expressed in our prior STA opinion that use of racial slurs here provides evidence of prohibited intent against this minority group.[3] *Lac du Flambeau*, 991 F.2d at 1263.

On appeal defendants maintain that their only motivation was to save fish (presumably so that they could catch them with rod and reel). Since only Indians can spear, they argue that any attack on spearing is necessarily an attack on Indians. Seeking cover in the Supreme Court's opinion in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. ____, 113 S. Ct. 753 (1993), defendants point out that a necessary coincidence between an activity and a protected class is alone insufficient to establish that protests of the activity are motivated by animus toward the class. However, the fact that one can legitimately protest spearing without being motivated by racial animus in no way immunizes these protests. There is a vast distinction between an attack on the group's right to participate in the activity and these attacks on the group.

Defendants' claims that only a concern for fish motivated them and that they aimed their attacks only at the Indians' right to spear are fatally undercut by the racially biased, inaccurate discussions of Indians' welfare status in STA's own literature. Whether or not people spearing fish receive federal benefits is certainly irrelevant to defendants' concern for fish. Defendants' fall-back position is that they are protesting against Indians as a political group with certain rights, *e.g.*, welfare and spearing, but not as a racial class. But any such distinction is meaningless here where defendants mocked Indian cere-

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[3] After this lawsuit was filed, the STA board authorized the destruction of all of its membership lists. As we noted in *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1134 (7th Cir. 1987), documentary destruction while litigation is pending is an indication that the documents would be unfavorable to the destroying party. Thus we give little credence to STA's claims that non-members made the bulk of the racist remarks.

monies and included in their protests derogatory stereotypes of Indians as fat and lazy.

Defendants claim that "[c]onsistent with the spirit of free and open debate, the effectiveness of an emotional protest depends largely upon the protesters' *ad hominem* attack" Br. 21. The trial court found that defendants' racial *ad hominem* attacks were indeed effective in motivating protesters to bear the cold Wisconsin nights at the boat landings:

> Although defendants would have been angry at anyone who restricted their fishing (including the Wisconsin Department of Natural Resources), it was a particular source of irritation that the threat came from persons they despised, whom they saw as fat, lazy, living on welfare at taxpayer expense and lacking appreciation for the wildlife resources of northern Wisconsin. The animosity for Indians as a group is what provided the fuel that kept protesters warm at the landings at ice-out time. Defendant Crist knew this and he employed it to his own ends deliberately.

843 F. Supp. at 1295.

Defendants finally contend that even if some protesters were motivated by racial prejudice fueled by STA rhetoric, defendants themselves and defendant Crist in particular were not so motivated and thus cannot be liable under the statute. They claim that the district court erroneously focused on "*how* Crist did what he did" and not "*why* he did it." Reply Br. 10. In resolving such a claim a court is faced with an obvious proof problem. Another's motivation can only be inferred from his statements and actions. The trial court must be able to take defendants' racist statements at face value and assume unless there is evidence to the contrary that they meant what they said. The district court found that despite his protests to the contrary, defendant Crist also was motivated by racial animus. Such a credibility determination by the finder of fact is entitled to deference and can virtually never amount to clear error. *Rennie v. Dalton*, 3 F.3d 1100, 1110 (7th Cir. 1993).

Moreover, as the trial court correctly noted, regardless of defendants' ultimate motivation, the fact that they deliberately stirred up and harnessed the racial animosity of others to serve their own ends is sufficient to find a violation of § 1982. See *Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir. 1974), certiorari denied, 419 U.S. 1070 (although motivated solely by profit, defendant could still have violated § 1982 when it exploited opportunities created by racism to sell homes to black families at excessive prices).

As part of their claim that the evidence did not support the trial court's judgment, defendants challenge the court's allocation of the burden of proof and the exclusion of evidence regarding the allegedly adverse effects of spearing. Both claims are meritless. In allocating the burden of persuasion, the trial court followed the procedure prescribed by the Supreme Court for mixed-motive discrimination cases in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242-246. Once the plaintiff showed that race was a motivating factor, the burden fell on defendants to show that "the interference would have occurred in the absence of racial prejudice." *Lac du Flambeau*, 843 F. Supp. at 1292. They failed abysmally to make such a showing.

The district court's approach was completely proper and consistent with our previous opinion in this case. Because the issue on remand was defendants' motivation, evidence of the alleged harmful effects of spearing would be relevant only if defendants could show that they specifically knew of and relied on such information in forming their own beliefs about spearing. They could not. Therefore, the district court properly excluded the evidence.

Finally, defendant's First Amendment challenge to the district court's injunction is without merit. The injunction is appropriately tailored and understandable to a reasonable person.

Award of attorneys' fees to plaintiffs

In awarding attorneys' fees, the district court is of course entitled to consider the results obtained. Here even

the STA concedes the effectiveness of the permanent injunction, for defendants have ended the harassment and intimidation previously exerted against the LDF. These Indians' rights are no longer being violated as a matter of course.

The plaintiffs' motion for attorneys' fees and costs was well supported by the affidavits submitted and excludes time for unsuccessful claims. The STA's argument that this lawsuit was "simple" is completely without support. It has resulted in three district court opinions and two opinions by this Court. This action involved many issues and extensive discovery proceedings and required the refutation of numerous motions. The various issues justified plaintiffs' retention of a large law firm knowledgeable in civil rights litigation. It is absurd to contend that plaintiffs were not prevailing parties or that they had only a modicum of success.

In careful opinions, the district court explained why plaintiffs were awarded $159,194.50 in attorneys' fees and an additional $82,647 for later work (Defendants' Separate App. 183-196 and Defendants' Br. App. A0036-A0040). Those opinions are persuasive that the amounts awarded were justified.

The judgments on the merits and on fees are affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

STATUTES INVOLVED

70a. Jurisdiction; claims considered; offsets and counterclaims

The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after [Aug. 13, 1946] the date of the approval of this Act shall be considered by the Commission.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

In determining the quantum of relief the Commission shall make appropriate deductions for all payments made

by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims [Claims Court] under section 145 of the Judicial Code (36 Stat. 1136; 28 U.S.C., sec. 250), as amended; [: Provided, That expenditures for food, rations, or provisions shall not be deemed payments on the claim. The] the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is hereby declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to the Act of June 18, 1934 (48 Stat. 984), save expenditures made under section 5 of that Act [25 USCS § 465], or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

(Aug. 13, 1946, ch 959, § 2, 60 Stat. 1050; Oct. 27, 1974, P. L. 93-494, § 2, 88 Stat. 1499.)

1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. (R.S. § 1978.)

1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 (42 U.S.C.A.

§ 2000bb et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Supreme Court, U.S.
FILED
APR 5 1995
OFFICE OF THE CLERK

No. 94-1492

In The

Supreme Court of the United States

October Term, 1994

DEAN M. CRIST,

Petitioner,

v.

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, WA-SWA-GON TREATY ASSOCIATION, THOMAS MAULSON, ROBERT MARTIN, NICK HOCKINGS, and GILBERT CHAPMAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The respondents object to the form and substance of the "Questions Presented For Review" in the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit and believe the questions should be as follows:

1. Is there any need for this Court to determine whether the district court abused its discretion in denying the petitioners' motion to file an amended answer – a denial that was affirmed by the court of appeals?

2. Has the petitioner shown a basis under Supreme Court Rule 10 for reviewing the decision of the Court of Appeals for the Seventh Circuit?

PARTIES

The names of the parties are as they appear in the caption of the case, except that Michael Allen has been removed as a plaintiff. Mr. Allen, who was previously included in his official capacity, is no longer tribal president. That office is now held by Thomas Maulson, who was already a plaintiff.

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OPINIONS BELOW

The names of the opinions below are correctly identified in the petition. The citation to the first opinion of the district court is, however, incorrect. The correct citation is 781 F. Supp. 1385 (W.D. Wis. 1992).

STATEMENT OF THE CASE

The plaintiffs in this action are the Lac du Flambeau Band of Lake Superior Indians, individual members of the band, and Wa-Swa-Gon Treaty Association, an unincorporated association of members of the band and others. The petitioner is a member and co-founder of a for-profit corporation called Stop Treaty Abuse-Wisconsin, Inc. The Lac du Flambeau Band is one of the Lake Superior Chippewa bands that have treaty-retained usufructuary rights to engage in off-reservation hunting, fishing, and trapping and gathering on public lands in the northern third of Wisconsin. *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341 (7th Cir. 1983) ("Voigt").[1] The plaintiffs brought this action on February 1, 1991, to enjoin the defendants from interfering with their ability – pursuant to their usufructuary rights – to spear walleyes and muskellunge.

[1] The court of appeals, in its 1983 decision, remanded the case for a determination of the scope of the state authority to regulate off-reservation hunting, fishing and gathering. The case generated numerous reported decisions and ended with entry of final judgment in *Lac Courte Oreilles Band v. Wisconsin*, 775 F. Supp. 321 (W.D. Wis. 1991).

On March 15, 1991, the district court granted the plaintiffs' request for a preliminary injunction. *Lac du Flambeau Band v. Stop Treaty Abuse-Wisconsin, Inc.*, 759 F. Supp. 1339 (W.D. Wis. 1991). The injunction remained in effect for the whole of the 1991 spearing season. The district court also entered a scheduling order that, in part, required the parties to file any amendments to their pleadings by July 1, 1991, and file any dispositive motions by October 1, 1991 (later extended to October 15, 1991). Shortly before the deadline for the filing of dispositive motions, the plaintiffs moved for summary judgment. On December 2, 1991 – a week after the motion for summary judgment had been fully briefed – Crist and Stop Treaty Abuse requested leave to file an additional, supplemental, brief in which they raised, for the first time, the claim that, notwithstanding the Seventh Circuit Court of Appeals' 1983 decision in *Voigt*, the doctrine of *res judicata* precluded the plaintiffs from exercising the ability to hunt, fish, and trap and gather on public lands because of rulings by the Indian Claims Commission in the 1970s.

The plaintiffs moved to strike the defendants' proposed "supplemental response" and, on December 24, 1991, Crist and Stop Treaty Abuse moved to amend their answer; the proposed amended answer contained the additional defense found in the supplemental response to the plaintiffs' motion for summary judgment.[2] In an order

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[2] The motion of December 24, 1991, was actually the second attempt by Crist and Stop Treaty Abuse belatedly to amend their complaint. In a motion filed in early October, 1991, they sought leave to file an amended answer in which they alleged

entered on January 6, 1992, the district court denied the defendants' motion to amend and granted the plaintiffs' request to strike the defendants' supplemental response. The court also granted the plaintiffs' motion for summary judgment on the plaintiffs' claim that the defendants' activities had violated rights enjoyed by the plaintiffs under 42 U.S.C. § 1982. A-20 and A-21.

On appeal by Crist and Stop Treaty Abuse, the Court of Appeals for the Seventh Circuit reversed the district court's summary judgment, reinstated the preliminary injunction, and remanded for trial on the sole issue whether, in interfering with the plaintiffs' treaty-reserved fishing rights, the defendants were motivated by racial animus. A-48. On the other hand, the court of appeals specifically affirmed both the district court's decision denying the defendants' motions to amend their answer and the district court's decision granting the plaintiffs' motion to strike the defendants' supplemental response. A-48.

Upon remand, the district court conducted a bench trial and on February 7, 1994, issued an opinion in which it found that the defendants' activities were motivated by racial prejudice, that the activities would not have occurred but for the prejudice, and that the plaintiffs' rights under 42 U.S.C. § 1982 had been violated. A-67 through A-75. The court permanently restrained Crist and Stop Treaty Abuse from interfering with the plaintiffs' exercise of off-reservation fishing rights and, on

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that the plaintiffs lacked sufficient Indian "blood quantum" to bring the instant action. The district court denied the motion at a hearing on October 31, 1991. A-2.

appeal again by Crist and Stop Treaty Abuse to the Court of Appeals for the Seventh Circuit, the court affirmed the district court's judgment on the merits in all respects. A-84.

SUMMARY OF ARGUMENT

There is no reason for this Court to issue the requested writ. The petitioner has failed to satisfy any of the criteria in Supreme Court Rule 10 for reviewing the decision of the Court of Appeals for the Seventh Circuit.

REASONS FOR DENYING A WRIT

1. The issue raised in Crist's petition relating to rulings of the Indian Claims Commission ("ICC") is not properly before this Court. The ICC rulings made up the "defense" that Crist and Stop Treaty Abuse attempted to assert for the first time in their December 2, 1991, "supplemental response" to the plaintiffs' motion for summary judgment and again in the amended answer that, on December 24, 1991, they sought leave to file. The ICC "dockets" referred to in Crist's petition (p. 3) were part of the untimely "supplemental response" stricken from the record by the trial court. They are not part of the record in this case and Crist's reference to them in his petition is improper.

The district court rejected the proffered defense not only because, in light of earlier decisions in the *Voigt* case, it would have been futile to permit the defendants

to file an answer containing the defense, but because the proposed amended answer was untimely. The court's scheduling order required that all amendments to pleadings be made by July 1, 1991, and when, almost six months later, Crist and Stop Treaty Abuse asked the court for permission to amend their answer to include the matter of the ICC rulings, the plaintiffs' summary judgment motion had been fully briefed and the scheduled trial was only six weeks away. Although Crist and Stop Treaty Abuse contended on their first appeal that the district court had abused its discretion in denying their motions to amend (and to file the supplemental response to the plaintiffs' motion for summary judgment), the court of appeals disagreed and, on the basis of the untimeliness of the defendants' filings alone, affirmed the district court in this regard:

> [Stop Treaty Abuse] . . . makes no convincing argument why the district judge abused her discretion in not allowing the amendments and supplemental brief due to their untimeliness. That alone is reason to deny STA's appeal of this issue, and avoids discussion of its convoluted arguments regarding *res judicata*, which, in any event, we find an unpersuasive collateral attack on our earlier decision in [*Lac Courte Oreilles* v.] *Voigt* [, 700 F.2d 341, *appeal dismissed and cert. denied sub nom. Besadny v. Lac Courte Oreilles*, 464 U.S. 805 (1983)]. *See Nevada v. United States*, 463 U.S. 110 (1983).

A-32.

The decision of the court of appeals affirming the trial court's discretionary denial of Crist's and Stop Treaty Abuse's motion to amend their answer neither

conflicts with any decision of any other appellate circuit court or any state court of last resort nor departs from the accepted and usual course of judicial proceedings. *Cf.* Supreme Court Rule 10.1(a). Moreover, the circuit court's affirmance of the trial court's enforcement of a scheduling order is not "an important question of federal law" which should be decided by this Court. *Cf.* Supreme Court Rule 10.1(c). Crist has failed utterly to demonstrate how the issues raised merit this court's examination.

Leave to amend pleadings may be denied for "apparent or declared reason[s]" such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962). As a general rule, the denial by a district court of a motion to amend pleadings under Fed. R. Civ. P. 15(a) is subject to reversal only if the district court abused its discretion by refusing to permit the amendment "without any justifying reason." *Foman*, 371 U.S. at 182. In the instant case, the district court provided the necessary "justifying reason[s]" and Crist has simply offered nothing at all to show that the district court's rejection of his six-month-late amendment was unjustified.

2. Crist's argument that the district court's finding of racial animus will have a "severely chilling" effect on "all future political protest" is nonsense. Crist's activities clearly did not constitute expression of the kind protected by the First Amendment. In any event, the court of appeals addressed at length in its first opinion the issue here raised by Crist:

> While the first amendment in fact does preserve the right to speak offensively, it does not provide a shield against the logical import of that speech. Using the allowed speech as evidence of a prohibited action does not negate the right to so speak. Conduct may be prohibited, even if the conduct is evidenced or carried out by speech, without abridging the right of free speech. *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). It bears keeping in mind that even if . . . [the plaintiffs] eventually prevail, *injunctive relief will not prevent STA members from shouting racist invective at spearing sites, only from engaging in racially-motivated activity that interferes with the fishing.*

A-39 and A-40 (emphasis added). As the court of appeals recognized, the plaintiffs did not sue Crist and Stop Treaty Abuse because Crist and the other defendants shouted racial slurs and opposed spearing. The action was filed because the defendants, including Crist himself, interfered with the plaintiffs' usufructuary fishing rights by blocking boat landings, forming flotillas to create high wakes, bringing violent mobs to the landings, and engaging in the other activities catalogued by the court at A-56 through A-67. The significance of the defendants' racial invective was solely as evidence of the defendants' racial animus, an element of the plaintiffs' civil-rights claim.[3]

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[3] Crist's assertion that he was found liable "without a shred of evidence of anti-Chippewa animus except for Crist's taking a leading role in the protests" flies in the face of the extensive and uncontradicted evidence in the record. In its opinion in the second of the appeals in this case, the court of appeals noted that the district court "marshalled six pages of evidence to show that defendants' interference with plaintiffs' spearfishing was

Crist's argument in this regard is considerably muddled by the additional assertion – wholly unsupported by the record in this case – that he has been driven "towards financial ruin" by the plaintiffs' action and that the "chilling effect of attorney liability for political protest under the civil rights statutes is onerous and portentous for others." Any financial liability, of course, is not the result of Crist's racial slurs and epithets. It is the result of his activities in preventing the plaintiffs from exercising rights protected by § 1982. As this Court said in *Cox v. Louisiana*, 379 U.S. 536, 555 (1965), in quoting from and reaffirming what was earlier said in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949), "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed." If Crist had limited his activities to speech – even racially offensive speech – the plaintiffs would not have brought this action.

The injunction entered by the district court – and upheld by the court of appeals in its second decision – will not prevent Crist from engaging in political protest. Only if he interferes with the legal rights of others does he risk liability. This proposition is so well established by decisions of this Court as to need no further explication in the present one. *Cox v. Louisiana* was decided 30 years

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racially motivated." A-79. Moreover, several pages of the district court's opinion were devoted to "Incidents Involving Defendant Crist" and contain ample evidence of Crist's racial animus. A-62 to A-67.

ago; it has not been overruled and the court of appeals did not depart from it. Crist has failed to show that the court of appeals' decision is in conflict with that of another court of appeals (or with that of a state court of last resort) on the same matter; he has failed to show that the court of appeals decided an important question of federal law which should be settled by this Court; and he has failed to show that the court of appeals decided a federal question in a way that conflicts with decisions of this Court. No important question is raised at all by the petition for a writ of certiorari.

CONCLUSION

For all of the reasons above, the petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,

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